SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 621

THE UNITED STATES, PETITIONER

vs.

KANSAS CITY LIFE INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit "A"—Contract for operation of real estate dated April 20, 1934	22	14
Exhibit "B"—Map showing Kansas City Life Insurance land in Weidmeir Chemical Co., District	27	20
Exhibit "C"—Map showing Kansas City Life Insurance land in Weidmeir Chemical Co., District	29	22
General traverse	31	25
Argument and submission of case	31	25
Special findings of fact	33	25
Conclusion of law	50	39
Opinion, Madden, J	50	39
Dissenting opinion, Whitaker, J	54	43
Note re exhibits	57	44
Judgment	59	45
Proceedings after entry of judgment	61	45
Clerk's certificate [omitted in printing]	65	45
Exhibits:		
Defendant's Exhibit No. 4—Gauge locations and areas at various elevations within the 1,710 acre portion Mississippi River Lock and Dam No. 26—Weidmeir Drainage District	66	46
Defendant's Exhibit No. 7—Mississippi River Lock and Dam No. 26—Details of Weidmer Drainage District	67	46
Defendant's Exhibit No. 12—Contour lines of Wiedmer Chemicals Co. Dist	68	46

1 In the Court of Claims of the United States of America

No. 45430

KANSAS CITY LIFE INSURANCE COMPANY, A CORPORATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed April 17, 1941

To the Honorable the Court of Claims:

Count I

1. Comes now plaintiff, Kansas City Life Insurance Company, a corporation organized as a life insurance company under the laws of the State of Missouri, and authorized to do business in the State of Missouri and elsewhere, and with its principal office in Kansas City, Missouri, and for the cause of action against defendant, The United States of America, the plaintiff pleads:

2 2. That plaintiff is and was at the time any damage accrued as set out hereinafter the owner of the fee simple title to the following lands situated in the County of St. Charles, State of Missouri, to-wit:

Tract No. I

In the County of St. Charles and State of Missouri, to-wit:

1st. A tract containing 9.98 acres in the Northeast corner of the Southeast Quarter (SE¼) of Section 17, Township 47 North, Range 4 East, described as follows: Commencing at the Northeast corner of said Southeast Quarter (SE¼) of said Section 17, an old stone for corner; thence with the East line of said Section 17, South 15.438 chains to an old stone for corner; thence North 38 deg. 29′ West 20.12 chains to an old stone for corner on the quarter section line; thence South 88 deg. 28′ East 12.952 chains along said Quarter Section line to the place of beginning.

2nd. A part of the North Half (N½) of Section 17, Township 47 North, Range 4 East, described as follows. Commencing at the Northeast corner of said Section 17, thence South 2 deg. 5′ West 45.63 chains to an old stone for corner; thence with the quarter Section line North 88 deg. 28′ West 12.952 chains to an old stone

for corner; thence North 33 deg. 15′ West 12.64 chains to an iron fence post for corner; thence North 35 deg. 42′ West 17.77 chains to an iron pipe for corner; thence North 56 deg. 47′ West 7.73 chains to an iron fence post for corner; thence North 65 deg. 13′ West 9.37 chains to an iron pipe for corner; thence North 48 deg. 14′ West 5.84 chains to an iron pipe for corner; thence North 5 deg. 44′ West 5.64 chains to an iron pipe for corner; thence North 26 deg. 59′ West 2.69 chains to an iron pipe for corner; thence North 61 deg. 14′ West 3.10 chains to an iron pipe for corner in the North line of said Section 17; thence with said Section line South
3 88 deg. 44′ East 55.70 chains to the place of beginning, containing 150.694 acres. As the same are shown on plat and survey made by Fred R. Jacoby, County Surveyor of St. Charles County, Missouri, dated June 8, 1928, and duly recorded in the Survey Records of said County, to which reference is hereby made.

And being also the same land conveyed to Wiedmer Chemical Co., by deed of W. H. Wiedmer, et al, dated Feb. 23, 1927, and recorded in the Recorder's Office of St. Charles County, Missouri, in Book 154, Page 551.

Also the easement right and privilege of the use of a Twenty (20) foot road, the center line of which commences on the south side of the County Road running along the North line of Section 8, Township 47, Range 4 East, at a point equi-distant from the Northeast corner of the East Half (E½), and the Northwest corner of the East Half (E½), of said Section 8, thence running South and with the center line of said East Half (E½) of Section 8 and parallel with the East line of said Section 8, to a point in the North line of Section 17, Township 47, Range 4 East.

Tract No. II

Said land being and situate in the County of Saint Charles, and State of Missouri, to-wit:

The SW¼, except One (1) acre for School Lot on West line thereof, and the S½ of SE¼ of Section 6, Township 47, North of Range 4, East of the 5th P. M., containing 216.58 acres, more or less, (excepting therefrom 63.94 acres described as follows, to wit: A tract of land situated in the SW¼ of Section 6, Township 47 North of Range 4 East, and being more particularly described as follows: Beginning at a stone at the Southwest corner of said Section 6, thence North 3 degrees, 54′ East 29.151 chains along the West line of said Section 6 to a point in the County Road; thence South 49 degrees 48′ E. 6.419 chains to an iron pipe; thence following the South and West base line of Levee as follows: South

84 degrees 46' East 2.847 chains to an iron pipe, South 88 degrees 19' East 4.883 chains to an iron pipe, South 83 degrees 06' East 3.622 chains to an iron pipe, South 76 degrees 59' East 4.758 chains to an iron pipe, S. 69 degrees 39' East 2.126 chains to an iron pipe, S. 48 degrees 52' East 2.195 chains to an iron pipe, South 25 degrees 14' East 2.127 chains to an iron pipe, South 5 degrees 53' East 3.312 chains to an iron pipe, South 2 degrees 12' West 4.674 chains to an iron pipe, So. 21 degrees 47' West 1.84 chains to an iron pipe, South 37 deg. 14' W. 3.049 chains to an iron pipe, So. 48 degrees 19' West 1.58 chains to an iron pipe, S. 2 degrees 55' W. 1.695 chains to an iron pipe, So. 22 deg. 33' East 2.077 chains to an iron pipe, S. 35 degrees 30' East 3.07 chains to an iron pipe in South line of said Section 6, then following said south line of Section 6, North 88 degrees 18' W., 27.03 chains to place of beginning, containing 63.94 acres).

The NW¼ of Section 8, Township 47, North of Range 4 East of the 5th P. M., lying East of Fish Slough, containing 164.60 acres, more or less.

The SW¼ of Section 8, Township 47, North of Range 4 East of the 5th P. M., lying East of Fish Slough, containing 153.75 acres, more or less.

The Southeast Quarter (SE¼) of Section 8, Township 47 North of Range 4 East of the 5th P. M., containing 164.60 acres, more or less.

The NE¼ of Section 8, Township 47 North of Range 4 East of the 5th P. M., containing 164.60 acres, more or less.

The NW¼ of Section 9, Township 47 North of Range 4 East of the 5th P. M., containing 172.36 acres, more or less.

The SW¼ of Section 9, Township 47, North of Range 4 East of 5th P. M., containing 172.36 acres, more or less.

The SE¼ of Section 9, Township 47, North of Range 4 East of the 5th P. M., containing 172.36 acres, more or less.

5 The NE¼ of Section 9, Township 47, North of Range 4 East of the 5th P. M. (except 9.80 acres for Roadway and Railroad Right-of-way), containing 162.56 acres more or less.

All that part of the South fractional Half of Section 10 lying West of the Dardenne Creek; also the N½ of NW¼ of Section 15; also 6.76 acres described as follows: Beginning at the Northwest corner of the NE¼ of Section 15, running thence East along the Section line 10.50 chains to a point One (1) chains and 91 links West of a stone near the West bank of Dardenne Creek; thence South 45 degrees; West 16 chains and 50 links to a point on the East line of the Northwest fractional Quarter of Section 15; thence North 11.76 chains to the place of beginning; also 5 acres, more or less, situated in the SW¼ of the NW¼ of Section 15, beginning at a Willow Tree 18 inches wide in diameter, growing on the We t

bank of Dardenne Creek, running thence Southwesterly up the Dardenne Creek 157 feet and 6 inches; thence Westwardly parallel to a slough a distance of 691 feet and 8 inches, thence Northwardly at right angles a distance of 315 feet, thence Eastwardly at right angles a distance of 691 feet and 8 inches to the Dardenne Creek, thence Southwardly and up the Dardenne Creek 157 feet and 6 inches to the place of beginning, together with right-of-way along the bank of Dardenne Creek over the lands of Herman D. Elman to the County Road at Hayford Bridge across the Dardenne Creek; also a part of that part of the S½ of the NW¼ of Section 15 bounded and more fully described as follows: Beginning at a stake set for the Northwest corner of the S½ of NW¼ of Section 15, thence running East 20.60 chains to a stake from which a Honey Locust 8 inches in diameter is South 60 degrees, West 28½ links and a Pecan 8 inches in diameter is South 61½ degrees, East 49½ links, thence South 43 degrees East 11.33 chains to a stake, from which a Pin Oak 30 inches in diameter is South 59½ deg., East 43 links, thence South 35½ deg., West 6.51 chains to a stake, thence West 2.09 chains to a stake in the prairie, thence North 13.26 chains to the place of beginning, all in Township 47 North of Range 4 East of the 5th P. M., containing 336.06 acres, more or less.

The NE¼ of Section 16, also lots 9 and 10 being all of the SE¼ lying North of Dardenne Creek of Section 16, Township 47 North of Range 4 East of the 5th P. M., containing 260.03 acres, more or less.

The NW¼; Also Lots 11, 12 and 14 being the N½ of SW¼, and the SE¼ of the SW¼ of Section 16, lying North of Dardenne Creek, all in Township 47 North of Range 4 East of the 5th P. M., containing 287.77 acres, more or less.

That said tracts of land contain an aggregate of 2,522.38 acres, more or less.

3. That in June 1922, The Davis-Wellcome Mortgage Company lent to Leonard Hillis and Annie Hillis, his wife, Erle W. Thompson and May M. Thompson, his wife, and Lester T. Jackson and Elvene Jackson, his wife, the then owners of said real estate, the total sum of $150,000.00, in consideration of which said borrowers executed and delivered to said The Davis-Wellcome Mortgage Company, thirteen separate notes and first deeds of trust, which deeds of trust together cover all the lands above described.

4. That on August 4, 1922, for a valuable consideration, The Davis-Wellcome Mortgage Company, by written assignment transferred said deeds of trust and the notes secured thereby to Kansas City Life Insurance Company, plaintiff.

5 That on February 23, 1927, W dmer Chemical Company, a Missouri Corporation, acquired sa real estate by deed subject to the first deeds of trust hereinbefore mentioned.

7 6. That on the 9th day of July 1929, said Wiedmer Chemical Company conveyed to Frederick G. A. Bardenheier, subject to the first deeds of trust hereinbefore mentioned, the land described as Tract No. 1 in paragraph two hereof.

7. That on the 23rd day of June 1931, all of said loans hereinbefore referred to became in default as to both principal and interest and have remained so since that time.

8. That on the 12th day of May 1933, the said plaintiff, Kansas City Life Insurance Company, acquired by deed from Frederick G. A. Bardenheier and Virginia A. Bardenheier, title to the land described as Tract No. 1, in paragraph two hereof.

9. That on the 20th day of April 1934, plaintiff, Kansas City Life Insurance Company, entered into a contract for operation of real estate with said Wiedmer Chemical Company, under the terms of which said Wiedmer Chemical Company acknowledged that such loans were in default and said Kansas City Life Insurance Company was given possession of such real estate and the right to manage same, collect the income therefrom and apply same on the loans.

10. A copy of said Contract for operation of real estate is attached hereto and marked "Exhibit A."

11. That on the 10th day of June 1938, said plaintiff, Kansas City Life Insurance Company, acquired title to the land described as Tract No. 2, in paragraph two hereof by deed from Wiedmer Chemical Company.

12. That said tracts of land have been known and are

8 referred to in reports of engineers and proceedings before the Committee on Rivers and Harbors of Congress as a private drainage district called Wiedmer Chemical Company, private.

13. That by Act of Congress entitled, "An Act to facilitate the prosecution of works projected for the improvement of Rivers and Harbors," approved April 14, 1888, the Secretary of War was authorized to cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceeding for the condemnation of any land or right-of-way needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision had been made by law.

14. That by Act of Congress, entitled, "An Act making appropriations for the construction, repair and preservation of certain

public works on rivers and harbors, and for other purposes," approved June 13, 1902, a board of engineers for rivers and harbors in the office of the chief of engineers, United States Army, and a system of improvements for rivers and harbors was provided. Such Act provided that there should be referred to said board of engineers all reports upon examinations provided for by Congress and all projects and changes in projects for works of river and harbor improvements and that such board of engineers should submit to the chief of engineers recommendations as to the desirability of commencing or continuing any and all improvements upon which reports were required. Such Act further provided that all reports on examinations and surveys authorized by law and all special reports ordered by Congress should in the discretion of the chief of engineers be reviewed by said Board of Engineers.

9 15. That by Act of Congress, entitled, "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved July 3d, 1930, improvements were adopted and authorized to be prosecuted on the Mississippi River between Missouri River and Minneapolis, Minnesota, and a 9 foot channel of said Mississippi River of width adequate for long haul barge service authorized. That the project authorized by such Act of Congress provided for the construction of locks and dams to raise the low water level of the river without substantially raising flood levels in order that a 9 foot channel might be provided.

16. That pursuant to said Act of Congress, the Secretary of War of the United States, through his officers, agents and engineers, on the day of 1934, began the construction of a dam, Number 26, at Alton, Illinois: That such dam was completed and put into service on or about the day of June 1938.

17. That the direct and immediate effect of the construction and operation of said dam was to raise the low water level of the said Mississippi River opposite these premises and back-water in Dardenne Creek to the amount of ten feet, and the average or normal summer stage about six feet. That previous to the erection and operation of such dam the drainage from plaintiff's real estate hereinbefore described, was carried away by said Dardenne Creek. That upon the erection and operation of such dam and the raising of the water level, such drainage was thereby prevented and water seeped into and under said land to such an extent that it was and is impossible to raise crops or utilize such land in any way for agricultural or other purposes.

10 18. This entire area is underlayed with water bearing sand extending from the Mississippi River channel to the Dardenne Creek channel and the upper surface of the sand is at

a higher level than the normal low water of the Mississippi River. The effect of raising the water level above this sand shuts off and prevents the underdrainage of this land, which it had in a natural state, into the Mississippi River and the Dardenne Creek at normal low water summer stages.

19. That the further direct and immediate effect of the construction and operation of said dam and the raising of the low water level of said Mississippi River opposite these premises was and is to cause the water to back into flow upon and seep into said premises.

20. That the reasonable market value of said real estate prior to the erection and operation of said dam was $100,000 per acre. That the effect of the erection and operation of said dam has been to take from and to deprive plaintiff of 1710 acres of said land described as:

E½ of NE¼;
A part of the S½ of W½ of NE¼;
A small tract in the SE Corner of NE¼ of SW¼;
E½ of SE¼ of SW¼;
SE¼; all in Section Eight (8).
All of Section Nine (9), except the NE¼ of NE¼;
S½ West of Levee, except approximately 50 acres
in NE Corner of said tract, all in Section Ten (10).
Part of N½ of Section Fifteen (15) West of Levee.
All of Section Sixteen (16) North of Levee.
All of Section Seventeeen (17) North of Levee.
All of said land being in Township Forty-seven (47) North,
Range Four (4) East of Fifth P. M., all as particularly shown in blue, in Plat attached marked "Exhibit B,"

rendering it of no value. That the reasonable market value of said 1,710 acres of land prior to the construction and operation of said dam was $171,000.00. That since the construction and operation of said dam and as a direct result of such construction and operation said 1,710 acres have no market value.

21. That the original plan of the chief of engineers, United States Army was that the loss to the lands involved in this case be remedied by tiling and drainage. That it was found that the tiling and drainage would cost more than the taking of the land.

22. That on April 30, 1935, a Committee on Rivers and Harbors of the House of Representatives adopted a resolution requesting the board of engineers on rivers and harbors to review the report on the Mississippi River between the Missouri River and Minneapolis, submitted in Rivers and Harbors Committee Document 234, 73d Congress, second session, with a view to ascertaining the

exact damages that might be caused to each of the levee and drainage districts bordering this river by seepage, backwater, and the increased cost of drainage caused by the prosecution of the existing project and probable capitalized cost of reimbursing each of said districts for such damage.

Pursuant to such resolution the district engineer on June 1st, 1936, made a report to the division engineer, upper Mississippi Valley, Division, St. Louis, Missouri. That a part of such report is as follows:

"Weidmer Chemical Co. District (private) is located about one-quarter mile from the right bank of the Mississippi River in St. Charles County, Missouri. The district is entirely en-
12 closed by levees and the embankment of the Chicago, Burlington & Quincy Railroad. Dardenne Creek adjoins the district on the south and east. During the 1929 high water the levees were overtopped and two crevasses were found. These crevasses were repaired in 1936. Drainage is removed by gravity, discharging into Dardenne Creek, which enters the Mississippi River at mile 227.3. This district has no pumping plant although one should be installed to provide adequate drainage under present conditions. Gravity drainage from the low-lying lands will be cut off when pool 26 is established. There are 1,254 acres of land which may be eliminated as agricultural land if funds are not expended for remedial works and 366 acres in addition which may be effectively drained by a combination of tiling and ditches. Upon the basis that the district installs a pumping plant, the average annual increased cost of operation is estimated at $2,339. It also will be necessary to construct additional tile drains and ditches at an estimated cost of $81,000. The total construction and capitalized annual cost of $139,475. The cost of acquiring 1,254 acres which may be damaged if funds are not expended for remedial works, and the cost of tiling and ditching 366 acres in addition is estimated at $93,540."

23. That on April 21st, 1937, the division engineer to whom such report was made, made a report to the chief of engineers, United States Army; that a part of such report is as follows:

TABLE 1.—*Estimate of cost of reimbursement for damage to levee and drainage districts due to operation of Mississippi River navigation pools*

Pool No.	Levee and drainage districts	Total capital cost of remedial measures	Cost of purchase of lowlands
26	Weidmer Chemical Co. district (Private)	139,475	93,540

24. That such district engineer made the following recommendation:

(a) "That the lowest figure shown in table 1 for each levee and drainage district be reported to Congress as the best possible estimate at this time of the capitalized cost of reimbursing the proper parties for damages to property in, and of, those districts, which may be caused by the prosecution of the existing navigation project, inviting attention to the fact that the cost of reimbursement is somewhat dependent upon the nature of the "authorizing legislation."

25. That on May 10, 1937, pursuant to such report the board of engineers for rivers and harbors made a report to the chief of engineers, United States Army. That such report contained the following recommendations (being paragraph 9 of such report):

"The pools to be formed by the navigation dams being built under the authorized project for the Mississippi River between the mouth of the Mississippi River and Minneapolis, will have an adverse effect on the internal drainage of certain of the levee and drainage districts bordering the river below Bellevue, Iowa. Plans have been developed to maintain proper drainage within these districts, after establishment of the navigation pools, by means of supplementary drainage works and pumping capacity where needed, and estimates have been prepared of the increase in the amounts of water to be pumped and the resulting added annual costs to the districts. The cost of the necessary remedial works plus the added annual costs capitalized at 4 percent represents the capitalized cost of rectification for each of the districts. Estimates have also been made of the value of lands in the various districts which would be rendered useless for agricultural purposes if no steps are taken to correct the effects of the navigation pools. It is found that in seven of the 25 districts under consideration the cost of the abandonment of the land for agricultural purposes is less than the estimated capitalized cost of rectification. The board concurs in the views of the district and division engineers that in these seven districts this cost should be taken as the measure of the losses suffered in these districts, and should be considered as the probable cost of reimbursing each of these districts for damages, and that in the remaining districts the capitalized cost of rectification should be considered the measure of the losses and accepted as the probable cost of reimbursing each of those districts for damages. The board therefore reports, in compliance with the committee resolution authorizing this review, that the best determinations practicable at the present time of the probable capitalized cost of reimbursing each of the affected districts for the dam-

ages resulting from the establishment of the navigation pools in the Mississippi River between the mouth of the Missouri River and Minneapolis are as follows:

Item No.	Pool No.	Levee and drainage districts	Nature of reimbursement	Estimated cost
23	26	Weldmer Chemical Co. (Private)	Retirement of lands	$33,540

26. That thereafter, on May 25, 1937, after such report by board of engineers for rivers and harbors for the War Department, the chief of engineers of the United States Army, in submitting the report of such board of engineers, to the Committee on Rivers and Harbors, House of Representatives, stated as follows:

"The Board of Engineers for Rivers and Harbors has fully considered the reports secured from the district and division engineers, and the data and informatoin submitted by local interests at a hearing held before the Board. It finds that the establishment of the navigation pools in the Mississippi River will have an adverse effect upon the internal drainage of 25 districts bordering the river. It considers that the plans and estimates developed by the district engineer represent the best determination practicable at this time of the remedial works required and the increased cost of operating the various districts. It concurs in the views of the district and division engineers that in the seven districts where the value of the land rendered unsuitable for agricultural use is less than the estimated capitalized cost of rectification, this value should be taken as the measure of the losses suffered in those districts, and should be considered as the probable cost of reimbursing each of these districts for damages, and that in the remaining districts the capitalized cost of rectification should be considered the measure of the losses and accepted as the probable cost of reimbursing each of those districts for damages. The Board presents in paragraph 9 of its report a list showing as nearly as can be estimated the exact damages that may be caused to each of the levee districts bordering this section by the river by seepage, backwater, and the increased cost of drainage that will be caused by the prosecution of the existing project, based on the probably capitalized cost of reimbursing each of said districts for such damages. The total capitalized cost of such reimbursement is found to be $1,993,276."

27. That such reports of district engineer, division engineer, board of engineers and chief of engineers was duly published and styled Document #34, 75th Congress, First Session, Committee on

Rivers and Harbors. That the portions of such reports set out above refer to the property of plaintiff above described.

28. That pursuant to submission to it of said Document No. 34, 75th Congress, First Session, Committee on Rivers and Harbors, the 75th Congress of the United States passed an Act, approved August 26th, 1937, entitled, "An Act Authorizing the construction, repair, and preservation of certain public works on Rivers and Harbors, and for other purposes." That such Act provides that certain works of improvement of rivers and harbors, and other waterways are adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans recommended in the respective reports therein designated. That the provision of such Act as to the Mississippi River between the Missouri River and Minneapolis, Minnesota, was as follows:

"The existing project is hereby modified in accordance with the recommendations of the District Engineer in the report submitted in Rivers and Harbors Committee Document #34, 75th Congress."

29. That no condemnation or proceeding to acquire real estate described or any part thereof, or to acquire flowage rights therein has been brought by the United States of America, or by the Secretary of War, and that such Secretary of War and the Chief of Engineers of the United States Army have failed and refused to make any compensation to this plaintiff for such loss and depreciation.

30. This is a suit of a civil nature and constitutes a claim founded upon the Constitution of the United States Fifth Amendment, and upon Act of Congress being "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes," approved June 3rd, 1930, and referred to in paragraph 15 of this petition, and "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors and for other purposes," approved August 26th, 1937, and referred to in paragraph 28 herein, and said suit is founded upon an implied contract of the Government of the United States of America to pay value of land taken in a cause not sounding in tort and also involves the title of and loss to land situated in St. Charles County, in the State of Missouri. The amount of the claim herein, exclusive of interest and costs, exceeds the value of Ten Thousand ($10,000.00) Dollars.

31. That plaintiff is justly entitled to recover the amount claimed after allowing all just credits and offsets. That there has been no assignment or transfer of the claim set forth in this peti-

tion or any part thereof, or interest therein. That plaintiff is a citizen of the United States and has at all time borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

Wherefore, premises considered, plaintiff prays judgment against the Government of the United States of America, in the sum of One Hundred Seventy-one Thousand ($171,000.00), and for all other and further general relief to which the premises entitle plaintiff.

Count II

For further cause of action plaintiff adopts and makes a part hereof as if set out in full herein, paragraphs 1 to 31, of the first count of this petition.

That by reason of said law entitled, "An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved August 26, 1937, the United States of America has authorized and consented to recovery from it by plaintiff for the loss suffered and has fixed by the law the amount of recovery at Ninety-three Thousand Five Hundred Forty and No/100 ($93,540.00) Dollars, for the 1,254 acres and 366 acres mentioned in report set forth in paragraph 22 of Count I of this petition. Said 1,254 acres and 366 acres are described as follows:

E½ of NE¼ of Section 8;
SE¼ of Section 8;
All of Section 9, except NE¼ of NE¼;
Part of S½ of Section 10 West of Levee;
Part of N½ of Section 15 West of Levee;
All of Section 16 North of Levee;
All of Section 17 North of Levee; all of said land being in Township 47 North, Range 4 East of Fifth P. M., and as shown in Plat attached hereto, marked Exhibit "C."

Wherefore, premises considered, plaintiff prays judgment against the Government of the United States of America, in the sum of Ninety-three Thousand Five Hundred and Forty and No 100 ($93,540.00) Dollars, and for all other and further general relief to which the premises entitle plaintiff.

Count III

For further cause of action plaintiff adopts and makes a part hereof as if set out in full herein, paragraphs 1 to 31 of the first Count of this petition.

Plaintiff further alleges that in order to place such land in the condition in which it was prior to the construction and operation of such dam it will be necessary to install a pumping plant to pump water from said land and to construct additional tile drainage and ditches. That the average annual increased cost of operation for such pumping plant will be $2,339.00, and the cost of such additional tile drains and ditches
19 will be $81,000.00. That the total construction cost and capitalized annual costs of such pumping plant in order to remedy the condition caused by the construction and operation of said dam will be One Hundred Thirty-nine Thousand Four Hundred Seventy-five and No/100 ($139,475.00) Dollars.

Wherefore, premises considered, plaintiff prays judgment against the Government of the United States of America, in the sum of One Hundred Thirty-nine Thousand and Four Hundred Seventy-five and No/100 ($139,475.00) Dollars, and for all other and further general relief to which the premises entitle plaintiff.

Count IV

For further cause of action plaintiff adopts and makes a part hereof as if set out in full herein, paragraphs 1 to 20 and paragraphs 29, 30, and 31, of the first count of this petition.

Plaintiff further alleges that by reason of the erection and operation of such dam and the raising of water levels as alleged said land was overflowed during the years 1938 and 1939, the water destroying One Thousand acres of wheat, or 15,000 bushels, in 1938, and Five Hundred acres of wheat, or 7,500 bushels in 1939. That the market value of wheat in 1938 at the time of such destruction was sixty cents per bushel, and that the marekt value of such wheat in 1939 at the time of such destruction was sixty cents per bushel. That the loss of said two crops was Thirteen Thousand Five Hundred and No/100 ($13,500.00) Dollars.

Wherefore, premises considered, plaintiff prays judgment against the Government of the United States of America, in the sum of Thirteen Thousand and Five Hundred and No/100 ($13,500.00) Dollars, and for all other and further general relief to which the premises entitle plaintiff.

20 Count V

For further cause of action plaintiff adopts and makes a part hereof as if set out in full herein, paragraphs 1 to 20, and paragraphs 29, 30, and 31 of the First Count of this petition.

Plaintiff further alleges that by reason of the erection and operation of such dam as alleged, said land was overflowed during

the year 1940 and plaintiff was unable because thereof to raise during such year any crops whatever on 654 acres of said lands in Sections 15, 16, and 17 of the tract hereinbefore described in paragraph 20 of the first count of this petition. That the reasonable rental value of said 654 acres for such year was $10.00 per acre, or $6,540.00.

Wherefore, premises considered plaintiff prays judgment against the Government of the United States of America in the sum of Six Thousand Five Hundred and Forty ($6,540.00) Dollars, and for all other and further general relief to which the premises entitle plaintiff.

Respectfully submitted.

HARRY B. HAWES.
711 Transportation Bldg., Washington, D. C.,
Attorney for Plaintiff.

21 [*Duly sworn to by D. R. Alderman; jurat omitted in printing.*]

22 *Exhibit "A" to Petition*

Loan 5275–87.

Contract for Operation of Real Estate

Whereas, Wiedmer Chemical Company, a Corporation of St. Louis, Missouri, is the owner of those several tracts of land described in Thirteen deeds of trust executed by Leonard Hillis and Annie L. Hillis, his wife; Erle W. Thompson and May M. Thompson, his wife; Lester T. Jackson and Elvene Jackson, his wife, to Commerce Trust Company, Trustee for The Davis-Wellcome Mortgage Company, said several tracts of land being situated in St. Charles County, State of Missouri. Said several deeds of trust being briefly described and identified by date, Volume and Page of record and the number of acres of land described in each as follows:

Date	Record, St. Charles County, Mo.	Acres
June 2nd, 1922	Vol. 138, page 316	216.58
June 2nd, 1922	Vol. 138, page 319	164.60
June 14th, 1922	Vol. 138, page 322	153.75
June 2nd, 1922	Vol. 138, page 325	164.60
June 6th, 1922	Vol. 138, page 329	164.60
June 7th, 1922	Vol. 138, page 332	172.36
June 8th, 1922	Vol. 138, page 335	172.36
June 8th, 1922	Vol. 138, page 338	172.36
June 8th, 1922	Vol. 138, page 341	162.56
June 8th, 1922	Vol. 138, page 348	260.03
June 14th, 1922	Vol. 138, page 344	336.06
June 10th, 1922	Vol. 138, page 351	287.77
June 15th, 1922	Vol. 138, page 355	158.69

Whereas, each of said loans secured by each of said several deeds of trust are in default, and it is the desire of the Wiedmer Chemical Company, A Corporation, hereinafter referred to as owner, and Kansas City Life Insurance Company, the owner
23 and holder of the several notes secured by the several deeds of trust above set out, hereinafter referred to as mortgagee, that said mortgagee take possession of said real estate and the personal property used in connection therewith and pledged by said deeds of trust, and that said mortgagee operate the said properties and farms and collect all proceeds, rents and income therefrom.

It is, therefore, agreed between said owner and the mortgagee that the said mortgagee take possession and full charge of all of the land described in said several deeds of trust, together with all personal property and equipment described in and pledged by said deeds of trust, and with right to operate, control and manage same in the manner as if it owned said real estate, with the right to lease same or operate through tenant or agent, and with the right to collect all proceeds, rents and income.

It is agreed between the parties hereto that all income from said farms shall, after deducting necessary expenses, be applied on indebtedness of owner to mortgagee, and mortgagee shall continue in control of said real estate, operate same and collect the proceeds until such proceeds after deducting expenses shall pay all delinquencies on said loans, including taxes and payments on principal.

Mortgagee assumes no responsibility in connection with this agreement except to account for all proceeds actually collected and to give credit for same on the indebtedness aforesaid after deducting expenses.

Mortgagee shall have the right to repair and rebuild any improvements, buildings, or fences, in its discretion, and shall be entitled to deduct from the proceeds the costs of such repair and rebuilding.

This contract shall not deprive mortgagee of the right to foreclose or exercise any other rights it may have to enforce its lien or the collection of its indebtedness.

The rights hereunder shall continue so long as there be any delinquency as to either taxes, interest or principal, or it may be terminated at any time at the option of the mortgagee.

24 In event there is money in the hands of mortgagee upon termination of this contract same shall be applied on principal after deducting any expenses.

In witness whereof, the said Wiedmer Chemical Company and the Kansas City Life Insurance Company have caused these pres-

ents to be executed by its duly authorized officers, this 20th day of April A. D. 1934.

WIEDMER CHEMICAL COMPANY,
By LEONARD HILLIS, *President.*
KANSAS CITY LIFE INSURANCE COMPANY,
By D. T. TORRENS, *Vice President.*

Attest:

HARRY C. FULKS, *Secretary.*

Attest:

DAN H. COX, *Assistant Secretary.*

STATE OF MISSOURI,
County of St. Charles, ss:

On this 20th day of April 1934, before me, appeared Leonard Hillis, to me personally known, being by me duly sworn did say that he is the President of Wiedmer Chemical Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Leonard Hillis acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

LISSA B. WILKINSON, *Notary Public.*

My Commission Expires: May 8, 1937.

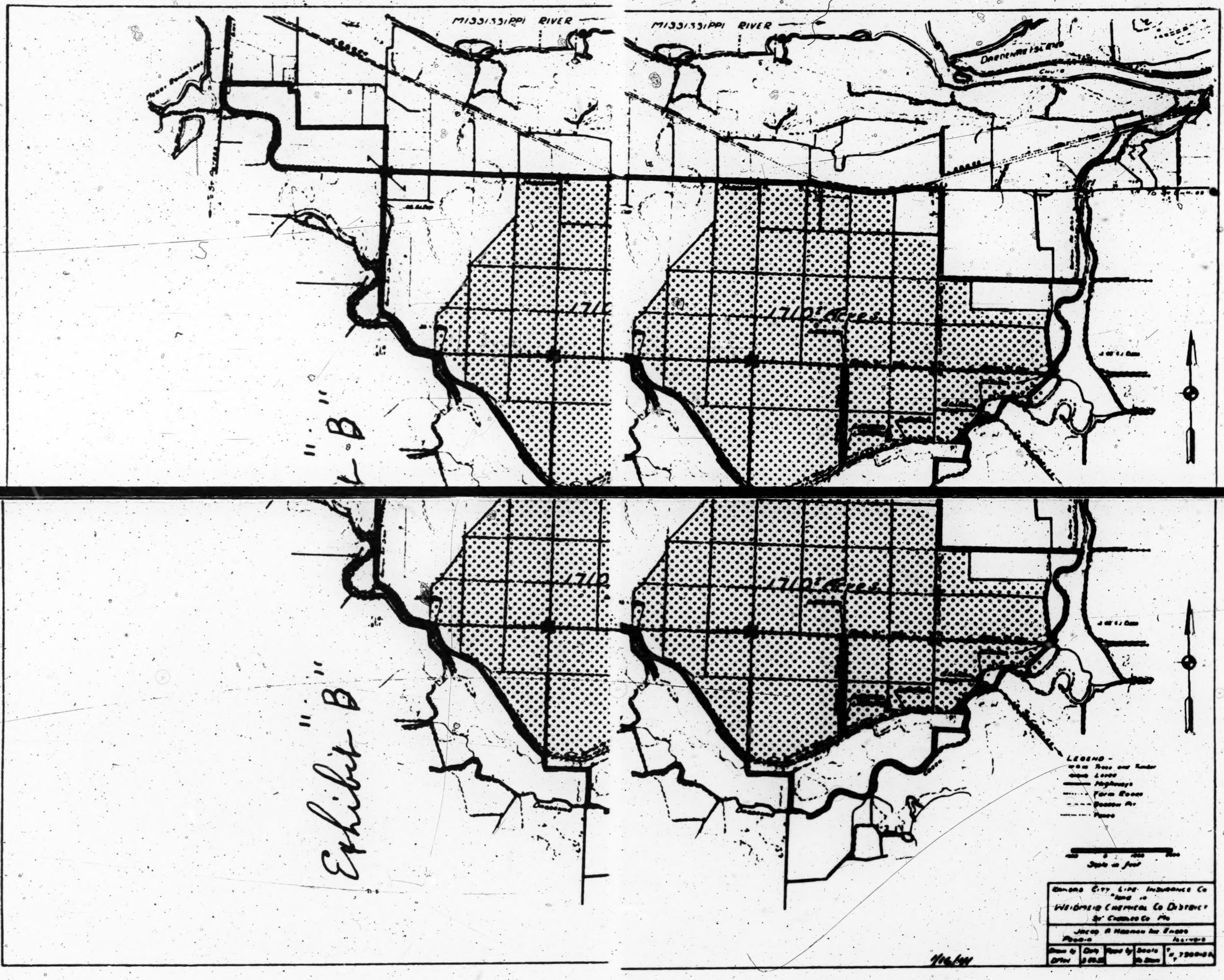
STATE OF MISSOURI,
County of Jackson, ss:

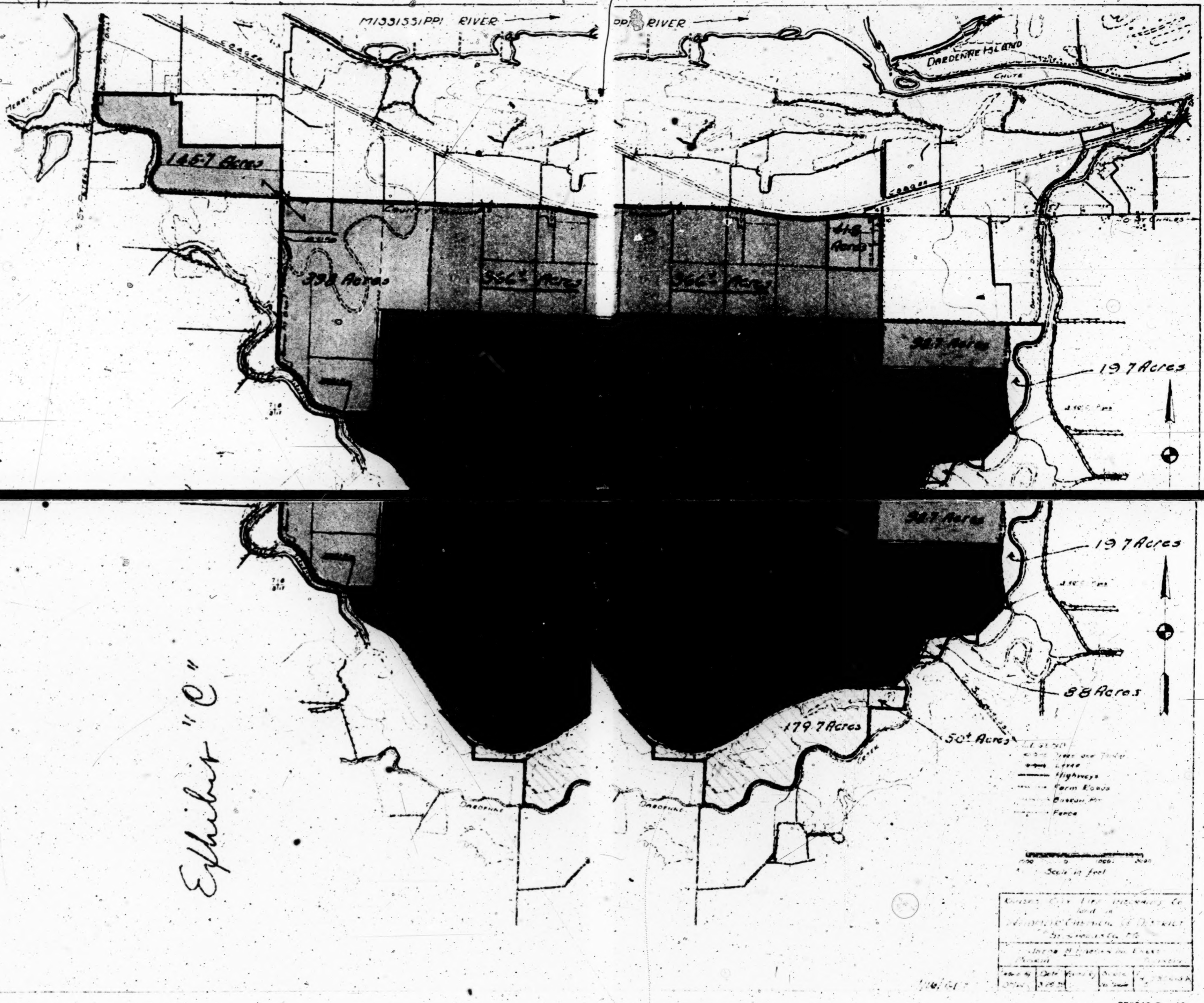
On this 23rd day of April 1934, before me, appeared D. T. Torrens, to me personally known, being by me duly sworn did say that he is the Vice President of the Kansas City Life Insurance Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed, sealed in behalf of said corporation by authority of its Board of Directors, and said D. T. Torrens acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[SEAL] I. B. MARLATT, *Notary Public.*

My Commission Expires June 23, 1935.


MISSISSIPPI RIVER
MISSISSIPPI RIVER
DREDGE ISLAND
CHUTE
1710 Acres
1710 Acres
Exhibit "B"
LEGEND -
Scale in feet
Kansas City Life Insurance Co
Land in
Weldwood Chemical Co District
St. Charles Co. Mo.
Jacob A. Hassman Jr. Engrs
Peoria Illinois
7-16-49


MISSISSIPPI RIVER
MISSISSIPPI RIVER
DARDENNE ISLAND
CHUTE
1457 Acres
398 Acres
366½ Acres
366½ Acres
416 Acres
382 Acres
197 Acres
197 Acres
88 Acres
179.7 Acres
50½ Acres
DARDENNE
DARDENNE
Levee
Highways
Farm Roads
Fence
Scale in feet
Exhibit "C"

778640 O - 46

31 *General Traverse*

(Filed May 27, 1941)

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) FRANCIS M. SHEA,
Assistgnt Attorney General.

BT.
RR.

Argument and submission of case

On October 8, 1947, the case was argued and submitted on merits by Mr. Stanley Bassett and by Mr. Ray B. Lucas, for plaintiff, and by Mr. Ralph S. Boyd for defendant.

33 *Special findings of fact, conclusion of law and opinion of the court by Madden, J. Dissenting opinion by Witaker, J.*

(Filed December 1, 1947)

Messrs. Stanley Bassett and Ray B. Lucas for the plaintiff.

Mr. Ralph S. Boyd, with whom was Mr. Assistant Attorney General A. Devitt Vanech, for the defendant. Mr. William H. Churchwell was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. Plaintiff, Kansas City Life Insurance Company, is an insurance corporation, organized under the laws of the State of Missouri and has its principal office in Kansas City. It brought this action to recover just compensation for the taking of 1,710 acres of land located in a private drainage district. Plaintiff claims that the taking resulted from the construction and operation of Lock and Dam No. 26 in the Mississippi River.

2. The land involved in this action is a part of the Wiedmer Chemical Company Drainage District, known locally as the Baldwin Farm. The District contains more than 2,500 acres of land and is located on Dardenne Creek, about one and one-half miles from its confluence with the Mississippi River. Dardenne Creek is a nonnavigable stream which empties into the Mississippi River about twenty-five miles above Dam No. 26. The farm is about

nine miles from St. Charles, Missouri, about twenty-five miles up the Mississippi River from the City of Alton, Illinois, and about thirty-five miles from the downtown district of St. Louis, Missouri.

34 3. On August 4, 1922, plaintiff purchased a loan secured by first deeds of trust upon the real estate described as Tract No. I and Tract No. II in plaintiff's petition, the loan being in the sum of $150,000. The two tracts contain an aggregate of 2,522.38 acres, of which the 1,710 acres in suit are a part. On June 23, 1931, the loans were in default as to principal and interest and have remained so since that time. On May 12, 1933, plaintiff acquired title to the land described in the petition as Tract No. I, and on June 10, 1938, plaintiff acquired title to Tract No. II.

4. Pursuant to authority contained in the Act of July 3, 1930, 46 Stat. 918, 927, as modified by Joint Resolution approved February 24, 1932, 47 Stat. 55, and the Act of August 30, 1935, 49 Stat. 1028, 1034, the United States constructed Lock and Dam No. 26 in the Mississippi River at Alton, Illinois. The dam was part of a project which was authorized for the purpose of providing a continuous nine-foot navigable channel from the head of navigation at Minneapolis, Minnesota, to the Missouri River, the stated depth to be secured by means of locks and dams between Minneapolis and Alton, Illinois, and by means of channel construction and dredging below the latter point. The construction of Lock and Dam No. 26 was begun on June 15, 1935, and the dam was completed on January 21, 1938. The raising of the pool was begun on May 1, 1938, but due to natural high water, filling of the pool was discontinued and open river conditions prevailed from May 25 to June 24, 1938. Full pool stage at the dam was first accomplished on August 8, 1938.

5. By resolution adopted January 29, 1932, the Committee on Rivers and Harbors of the House of Representatives requested the Board of Engineers for Rivers and Harbors to:

"* * * review the reports on survey of Mississippi River between Missouri River and Minneapolis, submitted in House Document Numbered 137, Seventy-second Congress, with a view to determining what additional damages may be caused to lands bordering this river by seepage and backwater, and the probable cost of making rectification thereof."

6. In response to the resolution, the Chief of Engineers, on March 8, 1934, submitted a report of the Board of Engineers of Rivers and Harbors, which was printed as Document No.

35 34, 73rd Congress, 2d Session. Along with the report, there was transmited a report of the District Engineer dated October 3, 1933, which was concurred in by the Board of Engineers for Rivers and Harbors and which, insofar as it pertains to plaintiff's claim, stated as follows:

"(7) Wiedmer Chemical Co. Drainage District is a privately owned district located in St. Charles County, Mo., opposite mile 621.6 to mile 625.5 in the Mississippi River. The district does not border the Mississippi River, being located south of the Chicago, Burlington & Quincy Railroad embankment. It is practically enclosed by a levee and the railroad embankment, except where it borders Dardenne Creek on the east. Drainage is removed from the district by gravity through 10 outlets. The land within this district lies well above the future average water surface elevation in the Mississippi River, during the proposed period of operation of Dam No. 26, as do also all of the gravity outlets. No adverse effect will be caused to this district by the proposed navigation improvement."

7. By resolution adopted April 30, 1935, the Committee on Rivers and Harbors of the House of Representatives requested the Board of Engineers for Rivers and Harbors to review the reports on the Mississippi River between the Missouri River and Minneapolis, Minnesota, submitted in Rivers and Harbors Committee Document No. 34, Seventy-third Congress, Second Session:

"* * * with a view to ascertaining as nearly as can be estimated the exact damages that may be caused to each of the levee and drainage districts bordering this river by seepage, backwater, and the increased cost of drainage that will be caused by the prosecution of the existing project, and the probable capitalized cost of reimbursing each of said districts for such damages."

Pursuant to this request, the District Engineer, the Division Engineer, the Board of Engineers, and the Chief of Engineers, submitted reports which were incorporated in Rivers and Harbors Document No. 34, 75th Congress, 1st Session.

8. The report of the District Engineer which appears in full in Rivers and Harbors Committee Document No. 34, 75th Congress,
36 was dated June 1, 1936, and discussed the entire lock and dam project on the upper Mississippi River. With particular reference to the lands in suit, the report provided as follows:

"103. Pool 26.—This pool will extend from mile 202.9, opposite Alton, Ill., to mile 241.4, a distance of 38.5 miles. The operation of this pool will be similar to pool 25, with a control point at Grafton, Ill., mile 218.0, at elevation 420.0, and the control point at the dam having a minimum elevation of 414.0 and the authorized pool elevation 419.0 as a maximum. Based upon available records, this pool will be unoperative 10 percent of the year because of high stages. Ten drainage or levee districts border on or drain into this pool. The location, assessed area, and estimated damage to each district are listed below:

District	Location			Assessed area in acres	Estimated damages		
	Bank	Limits (miles)			Annual	Capitalized cost	Cost of low areas
		Lower	Upper				
Wiedmer Chemical Co. district (private)	Right			2,860	2,339	[3] 139,475	[4] 93,540

[3] Includes $81,000 construction cost.
[4] Includes tiling and ditching of 366 acres in addition.

"112. Wiedmer Chemical Co. district (private) is located about one-quarter mile from the right bank of the Mississippi River in St. Charles County, Mo. The district is entirely enclosed by levees and the embankment of the Chicago, Burlington & Quincy Railroad. Dardenne Creek adjoins the district on the south and east. During the 1929 high water the levees were over-topped and two crevasses were found. These crevasses were repaired in 1936. Drainage is removed by gravity, discharging into Dardenne Creek, which enters the Mississippi River at mile 227.3. This district has no pumping plant although one should be installed to provide adequate drainage under present conditions. Gravity drainage from the low-lying lands will be cut off when pool 26 is established. There are 1,254 acres of land which may be eliminated as agricultural land if funds are not expended for remedial works and 366 acres in addition which may be effectively drained by a combination of tiling and ditches. Upon the basis that the district installs a pumping plant, the average annual increased cost of operation is estimated at $2,339. It also will be necessary to consruct additional tile drains and ditches at an estimated cost of $81,000. The total construction and capitalized annual cost is $139,475. The cost of acquiring 1,254 acres which may be damaged if funds are not expended for remedial works, and the cost of tiling and ditching 366 acres in addition is estimated at $93,540.

37

"119. Recommendations.—A comparison of the estimates of the capitalized cost of rectification of damages and the estimates of the cost of acquiring low lands within the districts, shows that in the seven following districts it is more economical to acquire the low lands:

Wiedmer Chemical Co. (private)

"It is therefore recommended that authority be granted the Secretary of War to acquire the low-lying lands in the above seven districts, for the United States in lieu of payment to the districts of the capitalized cost of maintaining their present drainage status and that the total estimated cost of $624,645 be made available therefor immediately."

This report was adopted and approved by the Division Engineer in a report dated April 21, 1937, by the Board of Engineers for Rivers and Harbors in its report dated May 10, 1937, and by letter of the Chief of Engineers dated May 25, 1937. In its concurring report of May 10, 1937, the Board of Engineers for Rivers and Harbors stated:

"9. The pools to be formed by the navigation dams being built under the authorized project for the Mississippi River between the mouth of the Missouri River and Minneapolis, will have an adverse effect on the internal drainage of certain of the levee and drainage districts bordering the river below Bellevue, Iowa. Plans have been developed to maintain proper drainage within these districts, after establishment of the navigation pools, by means of supplementary drainage works and pumping capacity where needed, and estimates have been prepared of the increase in the amounts of water to be pumped and the resulting added annual costs to the districts. The cost of the necessary remedial works plus the added annual costs capitalized at 4 percent represents the capitalized cost of rectification for each of the districts. Estimates have also been made of the value of lands in the various districts which would be rendered useless for agricultural
38 purposes if no steps are taken to correct the effects of the navigation pools. It is found that in seven of the 25 districts under consideration the cost of the abandonment of the land for agricultural purposes is less than the estimated capitalized cost of rectification. The Board concurs in the views of the district and division engineers that in these seven districts this cost should be taken as the measure of the losses suffered in those districts, and should be considered as the probable cost of reimbursing each of these districts for damages, and that in the remaining districts the capitalized cost of rectification should be considered the measure of the losses and accepted as the probable cost of reimbursing each of those districts for damages. The Board therefor reports, in compliance with the committee resolution authorizing this review, that the best determinations practicable at the present time of the probable capitalized cost of reim-

bursing each of the affected districts for the damages resulting from the establishment of the navigation pools in the Mississippi River between the mouth of the Missouri River and Minneapolis are as follows:

Item no.	Pool no.	Levee and drainage districts	Nature of reimbursement	Estimated costs
25	26	Wiedmer Chemical Co. (private)	Retirement of lands	$93,540"

9. By Act of August 26, 1937, Public No. 392, 75th Congress (50 Stat. 844, 848), Congress authorized certain works of improvement of rivers, harbors, and other waterways to be prosecuted under the direction of the Secretary of War and, with respect to the project involving Lock and Dam No. 26 on the Mississippi, provided as follows:

"Mississippi River between Missouri River and Minneapolis, Minnesota; The existing project is hereby modified in accordance with the recommendation of the District Engineer in the report submitted in Rivers and Harbors Committee Document Numbered 34, Seventy-fifth Congress."

10. Some time prior to the District Engineer's report of June 1, 1936, which is quoted in part above, the District Engineer apparently made a preliminary report which was adverse to plaintiff, because on January 25, 1937, plaintiff appealed in writing
39 to the Board of Engineers for Rivers and Harbors. In its written appeal, which is in evidence as plaintiff's exhibit No. 32, plaintiff stated in part as follows:

"The following statement is a summary and revision of the statements previously made to the U. S. District Engineer when preparing for his report dated June 1, 1936, and in which he stated that there would be no damages to this property, and from which conclusion this appeal is now being made.

"When the report of the U. S. District Engineer was made in June 1936, the two crevasses in the south levee caused by the flood of 1929 were still open, and the land was subject to backwater overflow. These crevasses have since been repaired, restoring the protection given by the existing levee."

The preliminary report of June 1, 1936, from which plaintiff appealed, is not in evidence and it was apparently superseded by the final report of the District Engineer, also dated June 1, 1936, which appears in Rivers and Harbors Committee Document No. 34, Seventy-fifth Congress. Neither the District Engineer nor any other of the officials who made the reports above referred to, testified at the hearing held in this case and, except as contained in the

reports, no evidence was presented with respect to the findings and recommendations which appear in these reports.

11. Plaintiff's farm varies in elevation between 422.7 feet and 428 feet above mean sea level. It is protected from flooding by backwater from the Mississippi River, on the north by the embankment of the C. B. & Q. Railroad which is at elevation 434, and on the east, south and west by a loop levee, the lowest elevation of which is 432.7 feet. The levee was constructed in 1903 and remained intact until the flood of 1929 when it was topped and crevassed at two points. These breaks were repaired in 1936. A cross levee extends from east to west across the lower one-third of the farm. Of the 1,710 acres in suit, 596.96 acres are south of the cross levee and the remainder are north of it. The farm is bounded on the south for about one-quarter of a mile and on the east for about one-half of a mile, by Dardenne Creek, which runs along the south border of the farm in a northeasterly direction and empties into the Mississippi about a mile northeast of the farm. At Dixon's Landing on the Illinois side of the Mississippi River, there
40. is a river gauge which has been in operation since 1930. This gauge is nearer plaintiff's land than any other gauge on the river. Dixon's Landing is about one mile above the mouth of Dardenne Creek and approximately 25 miles above the Lock and Dam 26. Gauge readings over the years have shown that the elevation of the river at Dixon's Landing is about the same as that at the mouth of Dardenne Creek. Prior to the construction of Dam 26, the mean low water mark in the Mississippi River at Dixon's Landing was about 410 feet above mean sea level and the ordinary high water mark was 420.4 feet. Before the dam was erected, the river stage exceeded an elevation of 419.6 feet about twenty-five percent of the time. The highest water recorded prior to 1934 was in 1929, when river stage reached an elevation of 434.5 feet. The average summer stage, June 21 to September 21, from 1930 to 1937 at Dixon's Landing was 413.9 feet.

12. The maximum authorized pool elevation at Dam 26 is 419 feet above mean sea level at the dam. When the water is held at elevation 419 feet at the dam, the pool elevation at Dixon's Landing which is 25 miles up the river, will vary from 419.1 to 422.5 feet above mean sea level, depending upon the volume of flow in the river. Exclusive of periods when the water was drawn down below normal operations, the average pool elevation maintained at the mouth of Dardenne Creek from August 1938 until May 1941 was 420.4 feet. When the river rises during flood stages, it is allowed to reach elevation 420 feet at Grafton, Illinois, which is the control point; then the gates at the dam are gradually opened and water is discharged underneath the gates. While elevation 420 at Grafton

is being maintained, the river stage at the dam drops from 419 to 414 feet. When the elevation of the river drops to 414 at the dam and is still 420 feet at Grafton, the gates are withdrawn from the water and the dam no longer exercises any control over the river. At that time open river conditions exist but the presence of the dam exercises a small retarding effect which increases the elevation of the water at the dam about six inches. This small increase is dissipated far below the upper region of the pool and does not affect the river stage at the mouth of Dardenne Creek, which is about 25 miles above the dam.

13. Since the highest pool elevation maintained by the dam at Dardene Creek is 422.5 feet and since plaintiff's land is protected by a levee to an elevation of 432.7 feet, the operation of defendant's dam and pool does not cause any flooding of plaintiff's land.

14. The natural drainage of plaintiff's farm, for both surface and subsurface water, is southward into Dardenne Creek. The surface of the land is slightly undulating and almost flat, having a general slope from the north to the south of less than 3 feet over a distance of one and one-half miles. The entire farm has a surface layer of heavy clay soil, sometimes known as gumbo, which varies in thickness from 5 to 16 feet. It is a soil of high fertility and when proper farming practices are applied and the soil is afforded adequate drainage, it is capable of producing good crops. When the soil becomes wet, however, it dries out slowly and special farming practices must be used even when it is properly drained. As a result of experiments and studies conducted by the Department of Agriculture and the agricultural colleges, the kind of farming practices which are necessary for successfully farming this type of land are now well established.

Because of the heavy texture of the soil, drainage of surface water alone will not enable the land to dry out sufficiently for timely planting and cultivation of crops. It is also essential that the excessive moisture in the soil be removed by drainage through the profile of the soil from the surface to the underlying stratum. The rate at which the profile drains the surface is dependent in large part upon the relative volume of the pore space in the soil. In a well-drained soil, the pore space averages from 15 to 25 percent of its volume, whereas in plaintiff's land the pore space is only 5 percent. This means that it is a critical soil in terms of getting the land dried out in time for the planting and growing of crops. Although vertical drainage from the surface through the profile of the soil on plaintiff's land is slow, it is effective and is conditioned by the depth of the water table below the surface. The rate of drainage diminishes as the height of the water table increases. When the water table is held to within three feet of the surface,

the soil remains cold and the seed rots or its germination is greatly delayed. Furthermore, the roots of most crops which can
42 be grown on this land, will, unless interfered with, extend at least three feet below the surface. If the underground water table is within from three to five feet of the surface, plants do not have a normal deep rooting because the air space is filled with water in the lower layers. If the air space in the soil is filled with water, the soil organisms, instead of converting and oxidizing organic material and liberating nitrates, converts nitrogen into ammonia which is detrimental to plant growth. In most soil, there is usually an upward movement of water by capillary action from an underground water table to the surface. Because of the heavy texture of the soil on this farm, however, the upward movement of underground water by capillarity is negligible, except when the water table is within one foot of the surface.

15. The surface drainage system on the Baldwin Farm was installed many years before defendant's dam was constructed. With the use of a grader, roadways were constructed around each 40-acre tract of land and small ditches, about one foot deep, were dug parallel to the roadways. Culvert pipes, 12 inches in diameter, were laid across the roadways in order to run the water from one 40-acre tract into the ditches of an adjoining 40-acre tract. There is a large ditch extending from east to west at the cross levee into which water from the small ditches drains. A main ditch carries the water from the north part of the property southward to a borrow pit on the landward side of the levee on Dardenne Creek. Prior to 1943 there were 14 or 15 outlet pipes extending through the toe of the levee on Dardenne Creek. These pipes were provided with wooden gates, which were opened for drainage of water into the creek when the river was low and were closed to prevent water from backing into the land when the river was high. In 1943, two 48-inch tubes were laid in the southeast corner of the land for draining water into Dardenne Creek; they are equipped with swinging doors so that when the creek is not against the tubes, the water drains out; when the water in the creek rises up to the level of the gates, they are closed to prevent the entrance of backwater on the land.

When the outlets into Dardenne Creek are blocked by high water in the river and in the creek, the accumulated surface water on the farm can be gotten rid of only by being pumped over the levee into the creek. In former years, three pumps
43 were in operation for this purpose but their use was discontinued some time prior to 1934.

16. Underneath the clay soil on plaintiff's land, there is a stratum of water-bearing sand, the top elevation of which varies

from 412 to 414 feet above mean sea level. The water in the sand is affected by the rise and fall of the Mississippi River and the water table under the land rises and falls in response to high or low water conditions in the river. The water level in the underground strata is also affected by rainfall on the land, because the sand stratum acts as a reservoir for water which drains vertically from the surface of the ground.

Beginning in 1934, a number of test wells were dug on the Baldwin Farm and from time to time observations of the water table were made and recorded. It was found that when the river was low, the water table under the land was also low and when the river rose, the height of the water table increased, but the water table was always higher than the river except during the dry summer months when vegetation was extracting the water. In general, the water table under the land prior to the construction of the dam was at an elevation of from 3 to 4 feet above the river stage at Dixon's Landing. The height of the water table varied with the slope of the land, the lower areas having a higher water table. At that time, the mean low water mark of the Mississippi River at Dixon's Landing was from 8 to 10 feet lower than the elevation at which the river has since been maintained at that point by the operation of the dam.

17. The bed of Dardenne Creek varies in width from 25 to 30 feet. The elevation of the bed of the creek opposite plaintiff's farm is from 410 to 413 feet above mean sea level. The depth of the channel, or the distance from the bed to the top of the creek bank, is from 12 to 14 feet. The elevation of the water in the creek on the low side of plaintiff's farm corresponds approximately to the elevation of the river at Dixon's Landing and the water in the creek rises and falls with changes in the river stages. Prior to the time that Dam 26 was built, the Mississippi River in the vicinity of plaintiff's land was subject to frequent floods. Usually during the spring floods, the river stage exceeded an elevation of
419 feet above mean sea level and this condition has not
44 changed since the dam has been built. Prior to the operation of Dam No. 26, however, the water in Dardenne Creek was only two or three feet deep, except during floods on the Mississippi or immediately after heavy rainfall on the watershed of the creek.

A cross-section of the levees on plaintiff's farm and a detail of the outlet drains located at the toe of the levee on the creek are shown in defendant's exhibit 7, which is made a part hereof. These outlet drains, which were placed beneath the levee at the creek and which serve to drain the surface water into Dardenne Creek, are at an elevation of approximately 420 feet above mean sea level.

Of the land involved in this suit, 70 acres are between elevations 422.7 and 423 feet; 818 acres lie between elevations 423 and 424 feet; 541 acres are between elevations 424 and 425; 238 acres are between elevations 425 and 426 feet and 43 acres are above 426 feet. The elevation of the land and of the outlet pipes into Dardenne Creek was, before the building of the dam, considerably higher than the level of the water in the creek, except during periods of high water. In the years prior to the operation of the dam, therefore, it was possible for both the surface and the underground water to drain off plaintiff's land into the creek and thence into the river.

18. The average pool elevation which has been maintained at the mouth of Dardenne Creek by operation of Dam 26 is 420.4 feet, and the elevation of the water in Dardenne Creek adjacent to plaintiff's farm has been raised from six to seven feet above the previous normal level. As a result of the operation of the dam, the surface of the water in the creek has been raised so that the creek water now backs into some of the outlet pipes in the plaintiff's levee, thereby obstructing and delaying the drainage of surface water from plaintiff's land. In addition, by maintaining the surface of the water in the creek to an elevation of 420 feet or more above sea level, the drainage of the underground water from a large portion of the plaintiff's farm has been almost entirely shut off. Prior to the construction of the dam this underground water drained through the sand strata under the land into the creek, which was normally only 2 or 3 feet deep at that time.

19. In the *District Engineer's report of June 1, 1936*, which appears in Rivers and Harbors Committee Document No. 34, 75th Congress (finding 8), it was stated that gravity drainage from the low-lying lands on plaintiff's farm would be cut off when pool No. 26 was established. The record does not disclose the extent to which the operation of Dam 26 obstructs or delays the drainage of surface water from the Baldwin Farm and there is no satisfactory proof with respect to the character or the cost of the additional drainage and pumping facilities which will be required to offset the condition created by the operation of the dam. However, under controlled river conditions, the water is held on the land after a rain for longer periods than was formerly the case and it will be necessary to provide additional drainage and pumping facilities in order to farm the land.

While floods occurred on the Mississippi and on Dardenne Creek prior to the erection of the dam with about the same frequency as they have since occurred, the river is not now allowed to drop to the low stages which existed in former years and the flood waters in the creek recede much more slowly than before. Prior to August 1938, the river stage at Dixon's Landing after floods dropped down

to an elevation averaging from 410 to 412 feet. Records of the river stages during those years reveal that there was almost always several months at the end of the year and about three months at the beginning of the year when the river stage was at an elevation of 410 feet or below. Under those conditions, an opportunity was provided for draining the surface and subsurface water from plaintiff's farm sufficiently for the planting, cultivation and harvesting of crops. Since the dam has been in operation, the conditions and the period of time, formerly available for draining the land and drying the soil, no longer exist.

20. As a result of the river stage being controlled by the operation of the dam, the water table under plaintiff's land is from four to five feet higher than it was during the low stages of the Mississippi prior to the erection of the dam. Under controlled river conditions, the water table beneath plaintiff's land has been raised to an elevation varying from 420.5 feet to 422 feet, or an average of from one to two feet higher than the controlled river stage at Dixon's Landing. The drainage of the underground water from beneath a large area of plaintiff's land has almost ceased.
46 On some portions of the land, vertical drainage from the surface to the underlying sand stratum has been cut off and on other portions it has been greatly retarded as a result of the increased height of the water table.

21. The effects of the operation of the dam became apparent within a short time after the full pool stage was obtained on August 8, 1938. After a rain, the surface of the soil dried out much more slowly than before and the drainage ditches did not carry off the water as readily. Excessive moisture was retained in the soil and planting of crops was delayed. Even when the surface appeared to be dry, the ground underneath was wet and would not support tractors and other farm machinery, which became mired down and had to cease operations. Seed planted on some portions of the land failed to germinate and would not. It was not possible to follow a proper crop rotation program. Because the soil was often too wet for planting some crops, it was necessary to substitute other crops which mature in a shorter time.

22. In 1946, a comparative yield measurement was made of corn grown at various elevations on plaintiff's land. It was found that the corn grown at an elevation of 425 feet or more above mean sea level produced from eighty-five to ninety-four bushels per acre. The yield of corn grown at an elevation of 424 feet was lower than that on the higher ground and its moisture content was greater. The computed yield of corn grown at an elevation of 423.5 feet was only 15.4 bushels per acre. Its growth was stunted and the ears were small. Its moisture content was much too high for cribbing or husking.

On the higher ground, the corn was better rooted and the roots were not deteriorated like those growing at a lower elevation.

23. The evidence regarding crop production on the land in suit, during the periods before and after the operation of defendant's dam, is incomplete and indefinite. However, it does appear that there was sharp variations from year to year in crop yields and income. Local farmers, who have resided in the area for many years, recalled that several bumper wheat crops were produced on the farm between 1905 and 1925 but there were no records available for those years. While no production or income figures
47 were shown for the years from 1925 to 1931, it was generally a period of low prices and poor yields. The owners during that time made an unsuccessful attempt to grow rice on a part of the land.

Plaintiff's books show the gross rent which it received annually from the entire 2,500 acre farm from 1934 to 1945, inclusive, but records were not kept separately for the 1,710 acres involved in this suit. During the five year period from 1934 through 1938, the rental received by plaintiff from crops produced on the farm varied from a low of $1,958.48 for the year 1938 to a high of $8,300.56 for the year 1934, or an average of $3,897.11 per year. The average gross crop rental received by plaintiff from 1939 to 1945 from the entire farm was $1,907.67, varying from $406.33 in 1943 to $4,786.65 in 1941.

In November 1946, when the hearing in this case was held complete crop returns for 1946 were not available. It was a favorable year for the production of crops in the area and most of the land north of the cross levee had been planted. At the time of the hearing, it appeared that the crops were much better than those produced in 1938.

Crop production and income received from the operation of the Baldwin Farm have been influenced by a number of factors, including proper maintenance of drainage structures, the amount of rainfall, the kind of farming practices used, the managerial ability of the farm operators, and the prices received for agricultural commodities. During the period from 1938 to 1943, the drainage facilities on the farm were not properly maintained and at times were filled with weeds and clogged with debris, but such facilities were well maintained from 1943 to 1946. From 1938 through 1945, the farming land was rented to tenants on a share basis and there is no proof regarding their managerial ability or the type of farming practices which they applied on the land. It is a matter of common knowledge that prices received by farmers for farm products were considerably higher from 1939 to 1946 than during the period from 1934 through 1938.

24. Plaintiff's exhibit No. 12 and defendant's exhibit No. 4, which are made a part hereof, are maps of the land in suit showing the acreage segregated according to various elevations above mean sea level. Of the 1,710 acres in suit, 596.96 acres are situ-
48 ated south of the cross levee and include the largest portion of the farm lying at the lowest elevation. Prior to August 8, 1938, this acreage had a lower market value than any other part of the land covered by plaintiff's claim. The evidence regarding the use and productivity of this tract before 1938 is vague and uncertain. While there was some crop production on a part of this land before 1938, it was not farmed with any regularity.

Of the 596.96 acres, 294 acres are located at or below an elevation of 423.5 feet above mean sea level. The underground water table beneath this acreage, especially during the planting season, was so near the surface even in the years prior to 1938 that its capacity for crop production was negligible. This, together with the fact that the land south of the cross levee has always received run-off water from the higher ground above, leads to the conclusion that the 294 acres had no value as agricultural land prior to August 8, 1938. The highest and most profitable use for the land was as a duck-hunting preserve and its value has not been diminished as a result of the operation of defendant's dam.

Of the remaining 302.96 acres south of the cross levee, 267 acres lie between elevations 423.5 and 425 feet and 35.96 acres are above elevation 425. Prior to August 8, 1938, the date on which full-pool stage above Dam 26 was first obtained, this 302.96 acres had a limited use for agricultural production, but there is no satisfactory proof of the exact amount by which the operation of the dam impaired its market value. A reasonable estimate of the amount by which it value was reduced by August 8, 1938, as a result of the operation of Dam 26, is the sum of $1,694.60.

25. On June 30, 1945, after the filing of plaintiff's petition in this suit, plaintiff granted to a syndicate of duck hunters an option to purchase 563.6 acres of the 596.96 acres in suit south of the cross levee at a price of $30.00 per acre, or a total of $16,908.00. The option was accepted by the purchasers on June 29, 1946, and the land is to be conveyed, subject to a reservation by plaintiff of the right to retain any amount recovered in this suit, and subject to certain other reservations which are not material here.

26. Included in plaintiff's claim are 1,113.04 acres of land which are located north of the cross levee. Of this acreage, 385
49 acres are situated at or below an elevation of 424 feet above mean sea level. The value of this 385-acre tract has been reduced more by the operation of defendant's dam than any other portion of the land in suit. The underground water table has been raised to within 3 feet of the surface of this

land and its drainage, for both surface and subsurface water, has been obstructed to a considerable extent. As a result, its market value has been reduced by more than one-half of its former value. By August 8, 1938, the market value of the 385 acres of land had, as a result of the construction and operation of defendant's dam, been impaired by the sum of $13,475.00.

27. Four hundred and twenty acres of the land in suit north of the cross levee lie at an elevation between 424 and 425 feet. This land has been affected by the operation of defendant's dam, but it has not been damaged as much as the tract of 385 acres dealt with in finding 26. The land is more difficult to farm than before and dries out more slowly after a rain. Unless additional drainage facilities are provided, crop yields will be reduced below what it was capable of producing prior to August 8, 1938. As a result of the construction and operation of defendant's dam, the market value of this 420 acres of land had, by August 8, 1938, been reduced by the sum of $7,350.00.

28. The remainder of the land covered by plaintiff's claim is at an elevation of 425 feet or more above mean sea level. Under controlled river conditions, the underground water table is more than three feet below the surface and it is the best drained portion of the entire area in suit. Although the testimony is conflicting, it has not been shown by a preponderance of the evidence that the market value of this land has been affected by the construction and operation of Dam No. 26.

29. The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

50 *Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover $22,519.60.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of twenty-two thousand, five hundred nineteen dollars and sixty cents ($22,519.60).

Opinion

MADDEN, Judge, delivered the opinion of the Court:

The plaintiff sues to recover compensation for harm allegedly done to the plaintiff's interests by the construction by the Govern-

ment of Lock and Dam No. 26 in the Mississippi River near Alton, Illinois. The suit relates to 1,710 acres of land owned by the plaintiff, lying near the Mississippi River, and bounded on the north by a railroad embankment and on the east, south, and west by a loop levee. Before the construction of Lock and Dam No. 26, the land, though flat and low, was several feet higher than the normal surface of the water in the Mississippi and in Dardenne Creek which passed by the plaintiff's land and emptied into the river a short distance away. The land was in a private drainage district and was ditched and tiled, and had large tubes passing through the levee to drain surface water into the creek. Since it was a few feet higher than the usual water level in the creek, its underground water also drained into the creek.

The construction of Lock and Dam No. 26 raised the level of the water in the river and the creek, when the pool behind the dam was filled in 1938, to 420.4 feet above mean sea level, which was approximately the altitude of ordinary high water level before the construction of the lock and dam. We have found that the consequence of this raising of the water level in the creek has been to shut off the flow of some of the tubes leading through the levee and thereby prevent the surface water from draining off some of the land. A more serious consequence, however, has been that it has prevented water in the strata underneath the plaintiff's land from draining away, thus keeping the underground water within one, two, or three feet from the surface of different portions of the plaintiff's land, thereby impairing its value for farming.

51 The plaintiff justifies its suit first, as a claim arising out of an Act of Congress and second, as a claim founded upon the Constitution for just compensation for a taking of its property. In support of its first theory the plaintiff points to the reports of the Army Engineers relating to the effects upon nearby lands of the construction of the series of Locks and Dams in the Mississippi River, including Lock and Dam No. 26. Our findings 5 to 11 relate to these reports. These reports show that the Army Engineers thought that it would be cheaper for the Government to acquire ownership of some 1,254 acres of the plaintiff's land and tile and ditch 366 additional acres which would be damaged by the proposed project than to pay the cost of keeping all of the land in use as agricultural land. The plaintiff then points to the Act of August 26, 1937, Public No. 392, 75th Congress, 50 Stat. 844, 848, in which Congress authorized certain rivers and harbors work, and, with respect to the project involving Lock and Dam No. 26, provided:

"Mississippi River between Missouri River and Minneapolis, Minnesota: The existing project is hereby modified in accordance with the recommendation of the District Engineer in the

report submitted in Rivers and Harbors Committee Document Numbered 34, Seventy-fifth Congress."

This is all the legislation to which the plaintiff can point. The Government did not, in fact, purchase or acquire by eminent domain a portion of the plaintiff's land, as the Army Engineers had recommended, or ditch and tile another portion, as they had recommended. It just went ahead and built its lock and dam. The plaintiff still owns its land. We think that the legislation quoted above, while it might have constituted an authorization to acquire some of the plaintiff's land by eminent domain and to spend money in tiling and ditching another part of it, does not constitute a Congressional waiver of immunity from suit or confession of liability for the consequences of building the dam.

We pass, then, to the question of whether there has been a taking of the plaintiff's land within the meaning of the Constitution. The plaintiff relies strongly upon the case of United States v. Causby, 328 U. S. 256. In that case this court and the Supreme Court
52 held that the United States by regularly flying planes over Causby's land at so low an altitude that it became impossible to use the land as a chicken farm, though it was still possible to use it for many other purposes, had "taken" an interest in the land in the nature of an easement, and was, under the Constitution, obligated to compensate Causby according to the scope and duration of the interest taken. This case shows that in the thinking of the courts, the idea of a "taking" in the constitutional sense is not limited to the assertion of one of a closed list of normal interests in land, such as easements of passage along the surface of land, easements of flowage, constant or intermittent, profits a prendre to take minerals or other substance from land, etc. In the Causby case the Supreme Court, in remanding the case to this Court, directed this court to describe with precision the interest taken by the Government and its duration, so that there may be no doubt as to what the Government will own when it has paid its judgment.

The plaintiff says that the Government's raising of the level of the water in Darglenne Creek to the point where the tubes from the plaintiff's land through the dike no longer carry off the surface water, and where the bed of the creek, formerly nearly dry in most seasons, does not carry off the underground water from the plaintiff's land, amounts to a "taking" of an interest in the plaintiff's land. We think that the plaintiff's contention is sound. One of the valuable incidents of the plaintiff's ownership, before the dam was built, was that the surface and underground water passed off his land leaving it available for profitable agriculture. That incident has now been impaired, in order to benefit navigation on the Mississippi. It is the kind of an incident of ownership that

could have been granted by the plaintiff to the Government or a neighbor, the privilege of holding surface and underground water in the plaintiff's land, to its detriment as agricultural land. Such a grant would have created a burden in rem upon the plaintiff's land, which would have passed to subsequent owners and bound them. We see no real difference between burdening the land by artificially flooding it with water, which has often been held to be a taking,[1] and converting it into a pond or a marsh by preventing the surface water which falls on it or flows on it from higher land from leaving it by either surface or underground drainage. We think that the fact that the change in the nature of the plaintiff's land has been accomplished principally by erecting a water barrier at its margin, preventing egress of water, rather than by causing the invasion of the land by water from outside, should not be the deciding factor.

The problem of the present weight of the case of United States v. Cress, 243 U. S. 316, arises. Dardenne Creek, which loops around the plaintiff's land and which furnished its natural drainage of surface and underground water, was a nonnavigable stream. But it empties into the Mississippi only about a mile and a half from the plaintiff's land. Cress's mill, the usefulness of which was destroyed by the raising of the water level in his case, was located on a nonnavigable stream. He was allowed to recover. The court's discussion in that case indicated that property owners even on the navigable river which was being directly improved by the dam in question there, were entitled to compensation for their interests destroyed by the raising of the water level. But the Court in United States v. Chicago, M. St. P. and P. R. Co., 312 U. S. 592, held that the Government, in the improvement of the navigability of a navigable stream, could with impunity raise the water level permanently to the ordinary high-water mark, and that owners on the navigable stream whose property was inundated thereby could not recover. The court said "What was said in the Cress case must be confined to the facts there disclosed."

In the case of Willow River Power Co. v. United States, 324 U. S. 499, the court held that a power company which had dammed a nonnavigable stream at the point where it flowed into a navigable stream in order to produce power from the fall of the water from the pool created by the dam to the natural level of the water in the navigable stream, was not entitled to compensation when the Government raised the level of the navigable stream to the point where the fall was not sufficient to create as much power as before.

---

[1] *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Dickinson*, 152 F. (2d) 865, aff'd 67 S. Ct. 1382.

These cases may indicate that the Cress case does not have a good prospect of survival. But it has not been overruled.
54 In the instant case, as in the Cress case, the harm was done by the raising of the water level in a nonnavigable stream, and the Government was not privileged, in the improvement of the navigability of the Mississippi, to "take" without compensation the interest which we have discussed above in the plaintiff's land on Dardenne Creek.

The plaintiff is entitled to recover $22,519.60.

It is so ordered.

HOWELL, Judge; LITTLETON, Judge; and JONES, Chief Justice, concur.

WHITAKER, Judge, dissenting:

I am unable to concur in the opinion of the majority. Whatever might have been the plaintiff's right to recover if the level of the Mississippi River had been raised above high-water mark, it is settled by numerous cases in the Supreme Court that it is not entitled to recover for any damage to its property, or for the destruction of it even, if the river is not raised above the high-water mark. United States v. Chicago, Milwaukee, St. Paul & P. Railroad Co., et al., 312 U. S. 592, and cases there cited; also Willink v. United States, 240 U. S. 572; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 62, 63; and other cases cited in the opinion of this court in Kelley's Creek & Northwestern Railroad Co. v. United States, 100 C. Cls. 396. The findings in this case show that the level of the Mississippi River was not raised above high-water mark. If it was not, the injury to plaintiff's property is damnum absque injuria.

The majority opinion says, however, that this rule does not apply since this property was not on the riverbank of the navigable stream, but on a nonnavigable tributary. It says this holding it required by United States v. Cress, 243 U. S. 316. The authority of this case has been twice limited to its particular facts (United States v. Chicago, Milwaukee, St. Paul & P. Railroad Co., supra; United States v. Willow River Power Co., 324 U. S. 499); but the majority says it has not been overruled and that the present case is governed by it, since plaintiff's property was not on the riverbank of the navigable stream but on a nonnavigable tributary.

This, it seems to me, makes no difference. If the Government is immune from damage to a plaintiff's property situated on
55 the bank of the river because it was below high-water mark, why should it not be also immune from damage to property on an estuary of the river a mile distant from the riverbank, if it also was below high-water mark of the navigable river? If the

rule as to property on the riverbank is correct, it seems to me that it is a necessary corollary that property distant from the riverbank but within its flow also comes within the rule.

Water insists on finding its own level. It climbs an embankment if it has no outlet; if it has an outlet it flows into it; the water "backs up" into the estuary until the water in it and in the river is on the same level. This it does in the river's natural state in times of high water, and continuously after a dam has been erected. In the natural state of the river the land on an estuary is no less inundated in times of high water than the lands adjacent to the riverbank. What the dam does it to make continuous what nature did only intermittently; but the effect on property on the bank and on the estuary is exactly the same.

Why the defendant should be immune from liability for damage to the one and liable for damage to the other I am wholly unable to see.

I cannot imagine that the Supreme Court intended to draw such a distinction. It does not appear from the opinion in United States v. Cress, supra, whether or not the level of the navigable river was raised above high-water mark. I assume it was, since, otherwise, it appears to me this opinion would be clearly in conflict with the cases cited in United States v. Chicago, Milwaukee, St. Paul & P. Railroad Co., supra, and others.

At any rate, I am unwilling to conclude that this opinion means to draw such a distinction which to me seems so wanting in reason or logic. Unless we ascribe to it such an intention, it is clearly in conflict with later, as well as earlier, decisions of the Court.

It may be true that the original rule is wrong, that as an incident to the power to regulate commerce between the States, the Government can raise the constant level of a navigable river to its high-water mark without incurring liability to property owners on the banks of the river whose property is thereby continuously inundated, whereas before it was subject only to intermittent overflows; but if this rule is to be adhered to then it must follow that it does not incur liability to a property owner whose property is
56 on an estuary of the river but within its flow in high water in the river's natural state.

The original rule is so firmly implanted in the decisions of our courts that it should not be overturned except by Act of Congress. That being the law, I think this plaintiff is debarred from recovery.

57 *Note re exhibits*

The following original exhibits made a part of the findings of this court accompany this record under separate cover:

Defendant's Exhibit No. 4.

Defendant's Exhibit No. 7.
Plaintiff's Exhibit No. 12.

59 *Judgment of the court*
(Dec. 1, 1947)

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-two thousand, five hundred nineteen dollars and sixty cents ($22,519.60).

61 *Proceedings after entry of judgment*

On January 26, 1948, the plaintiff filed a motion for a new trial.

On February 2, 1948, the court entered the following order on said motion:

ORDER

This case comes before the Court on plaintiff's motion for a new trial, and on consideration thereof:

It is ordered this 2nd day of February 1948, that said motion be and the same is allowed. The conclusion of law filed herein December 1, 1947, is this day amended by adding at the end thereof the following:

"together with interest at four percent per annum as a part of just compensation from August 8, 1938, until date of payment."

It is further ordered that there be added at the end of the next to the last line of the opinion, on page 22, the following:

63 "together with interest at four percent per annum as a part of just compensation from August 8, 1938, until date of payment."

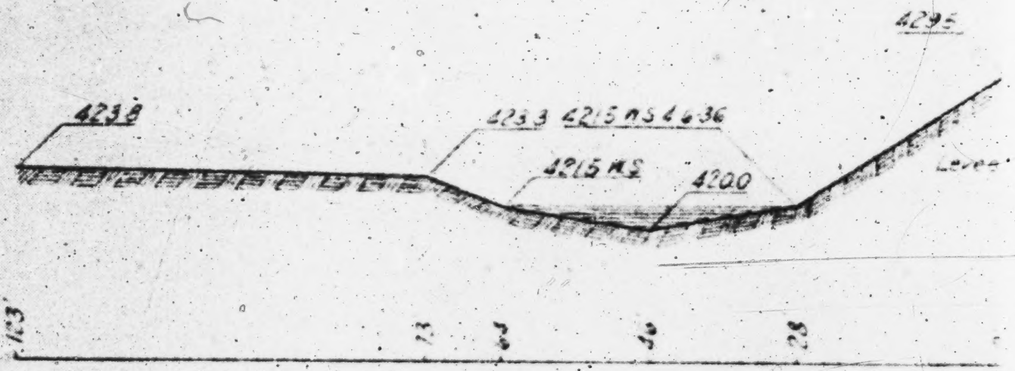
The conclusion of law and opinion as amended, and the findings of fact heretofore filed, are to stand.

By the Court.

(S) MARVIN JONES,
Chief Justice.

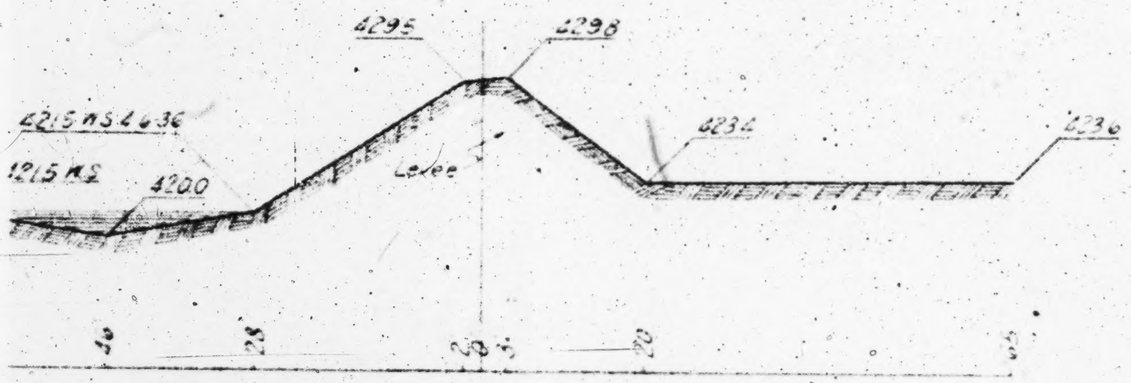
65 [Clerk's certificate to foregoing transcript omitted in printing.]

1-1



SECTION A-A

SCALE - HOR 1:20
VERT 1:10

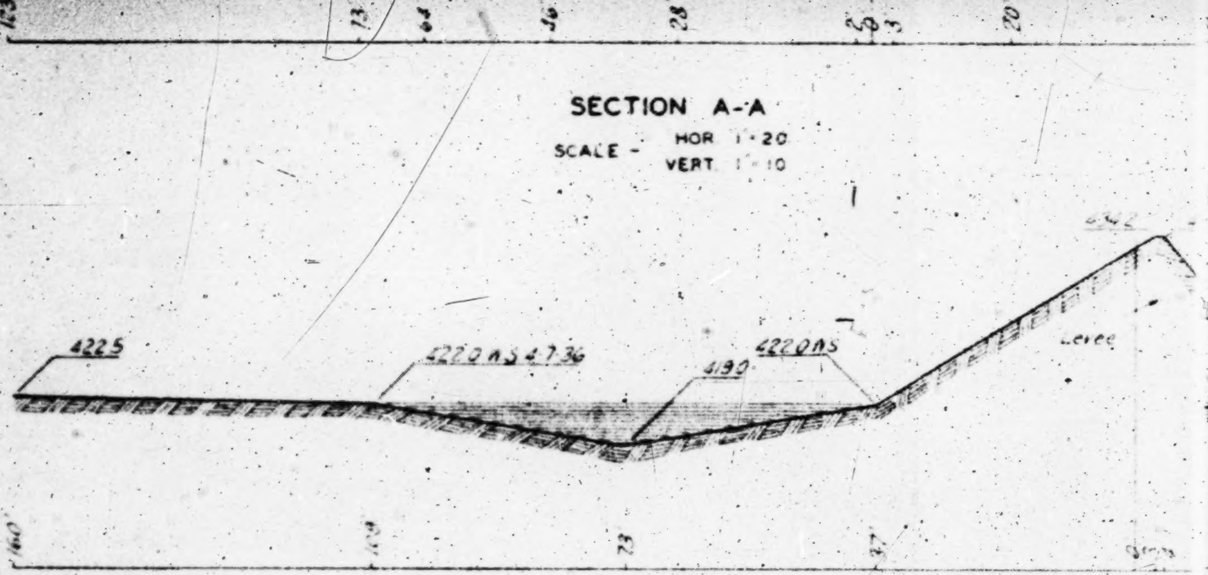


SECTION A-A

SCALE - HOR 1:20
VERT 1:10

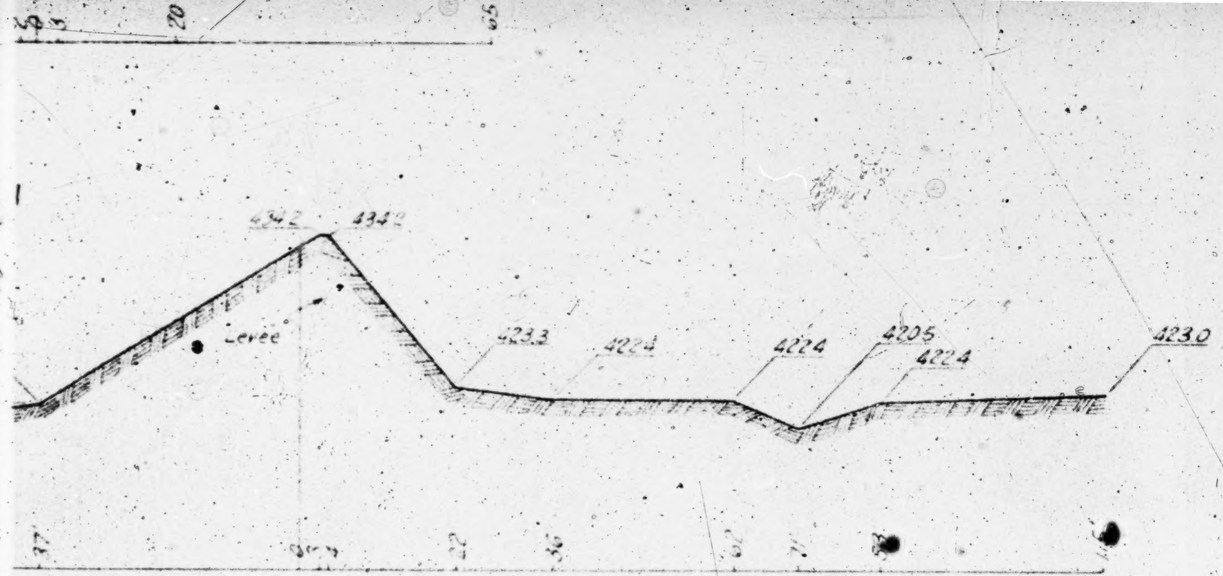
SECTION A-A

SCALE - HOR 1"=20'
VERT 1"=10'



SECTION B-B

SCALE - HOR 1"=20'
VERT 1"=10'



SECTION B-B

SCALE - HOR 1"=20'
VERT 1"=10'

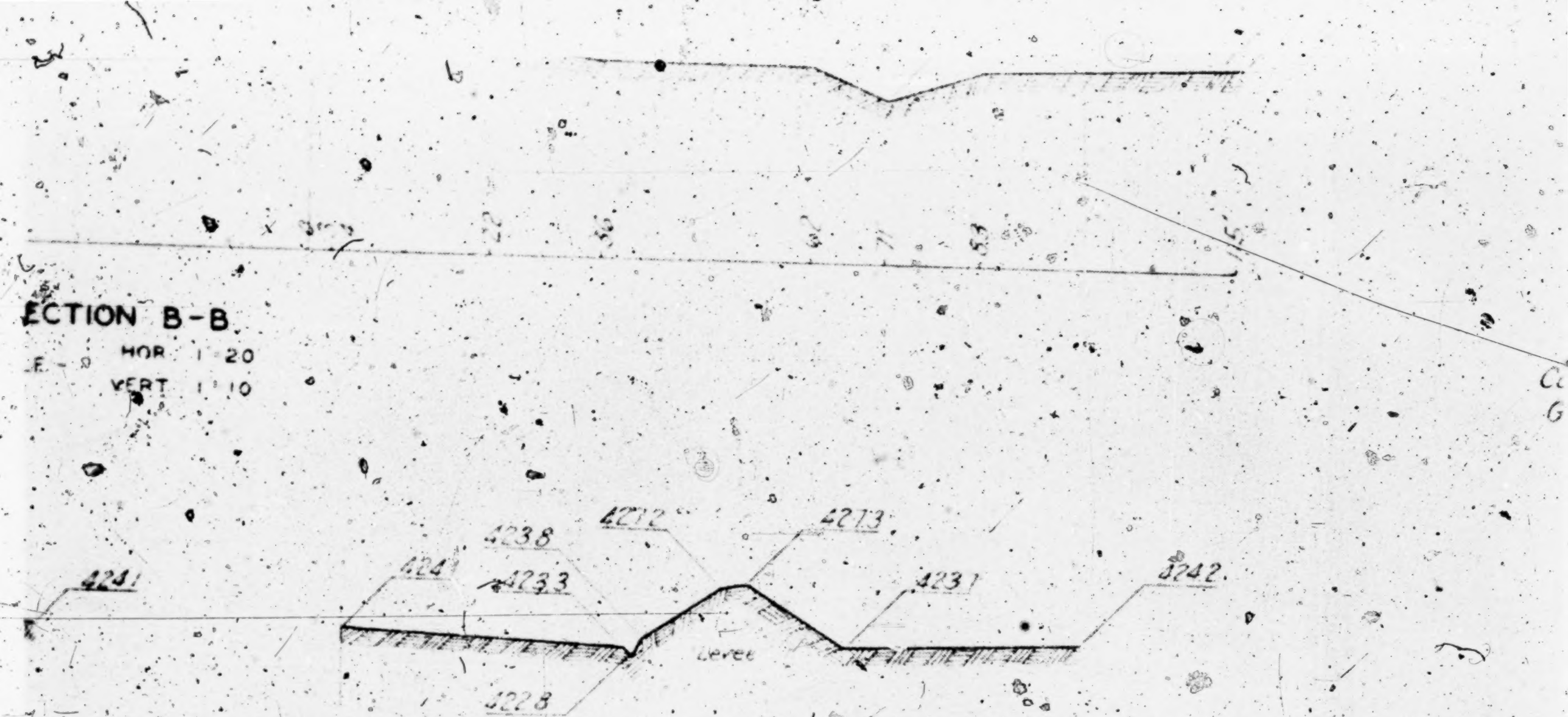
SECTION C-C

SCALE - HOR 1 = 20
VERT 1 = 10

ECTION B-B

E - D HOR 1 : 20

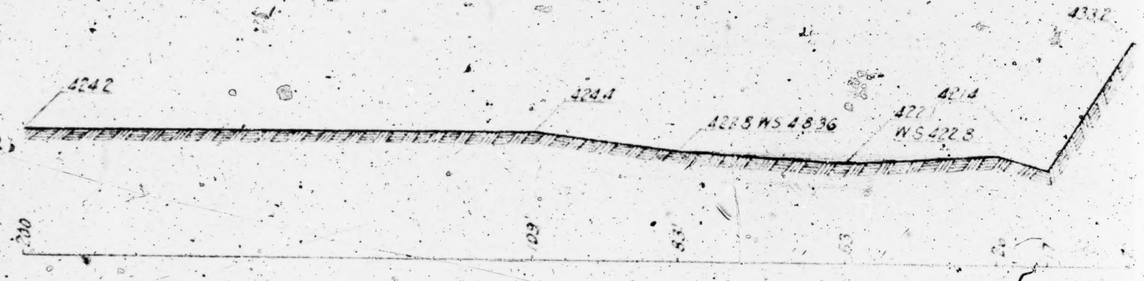
VERT 1 : 10



SECTION D-D

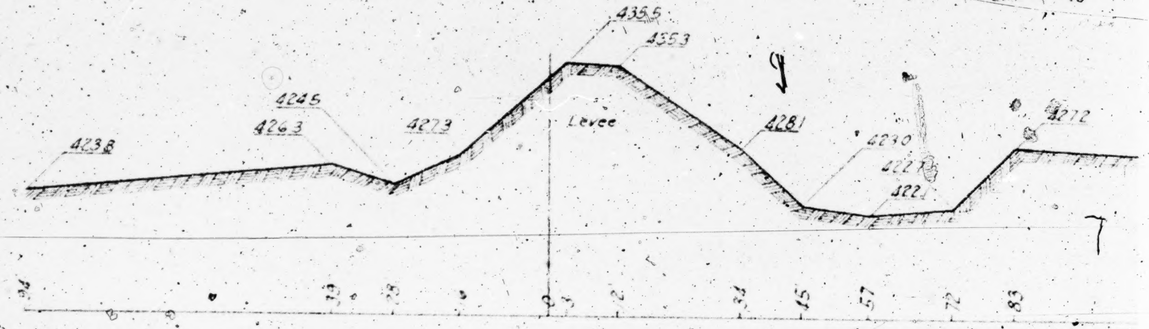
SCALE D HOR 1 : 20

VERT 1 : 10



SECTION E-E

SCALE - HOR 1" = 20'
VERT 1" = 10'



SECTION F-F

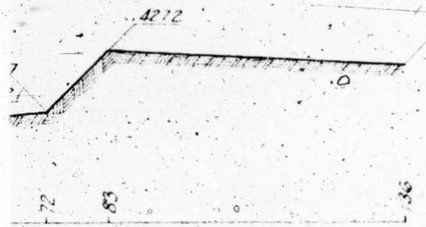
SCALE - HOR 1" = 20'
VERT 1" = 10'

SECTION D-D

SCALE - HOR 1" = 20'
VERT 1" = 10'

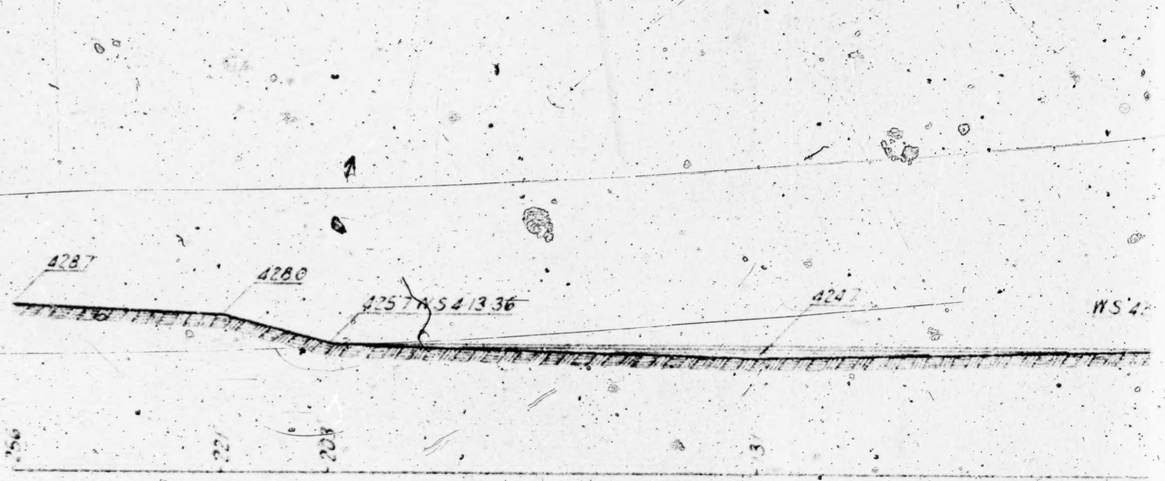
SECTION E-E

SCALE - HOR 1" = 20'
VERT. 1" = 10'



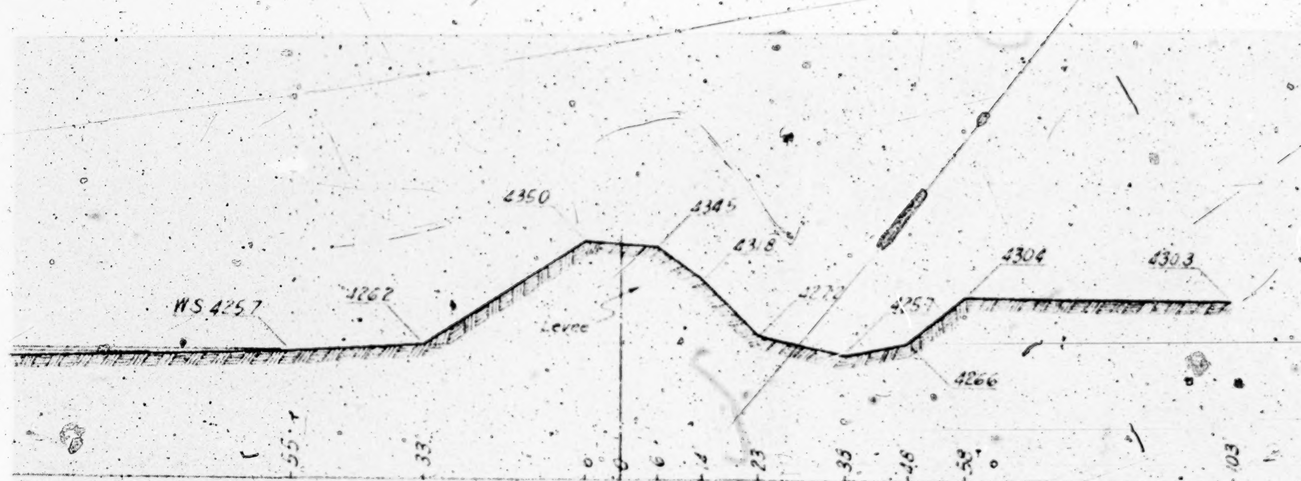
South End View of 2-30" CIP and 2-4'-4" Wooden Flood Gates. Location of Pipes is Shown in Detail "C"

Scale 1"=10'



SECTION G-

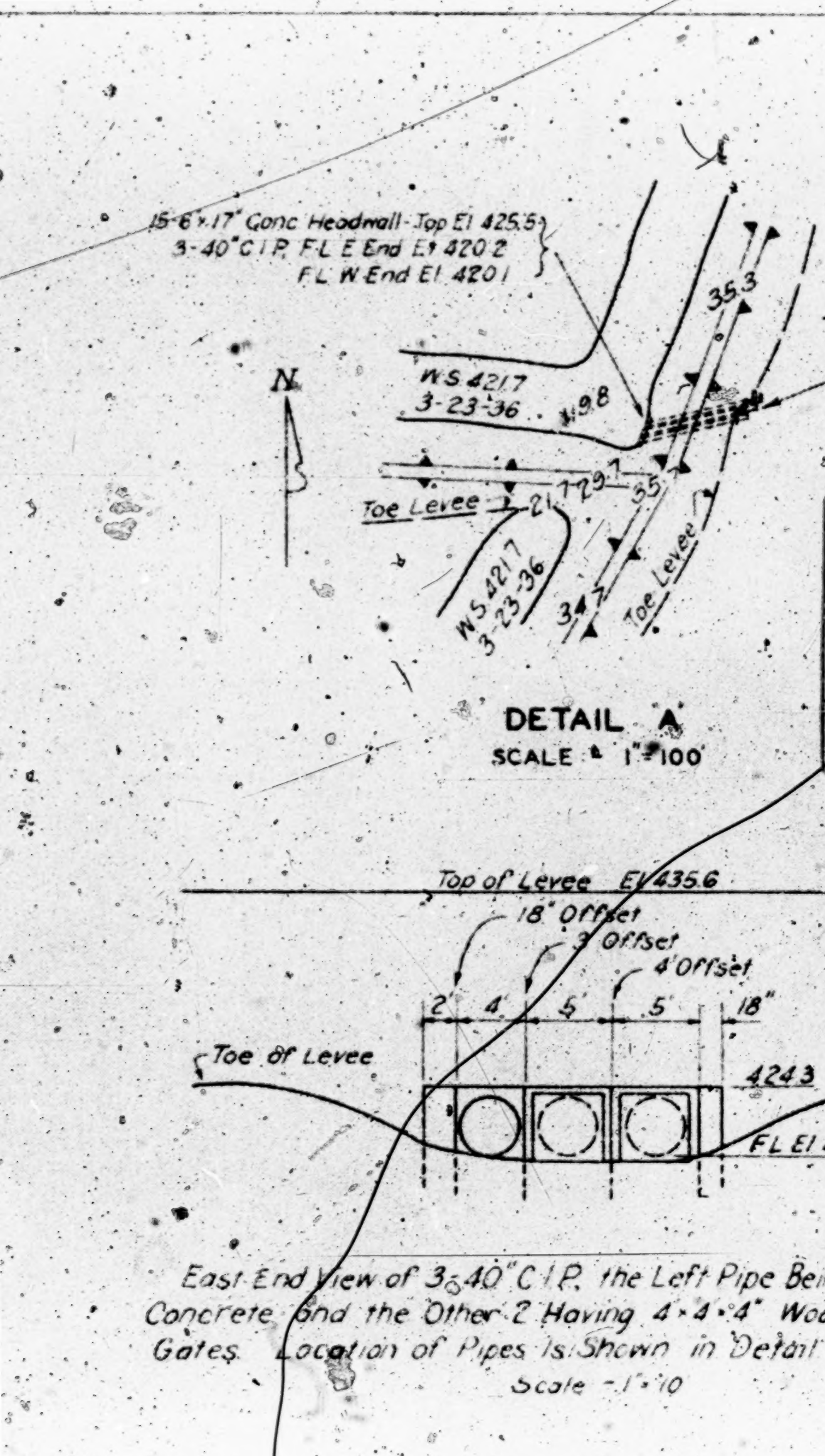
SCALE - HOR
VERT



SECTION G-G

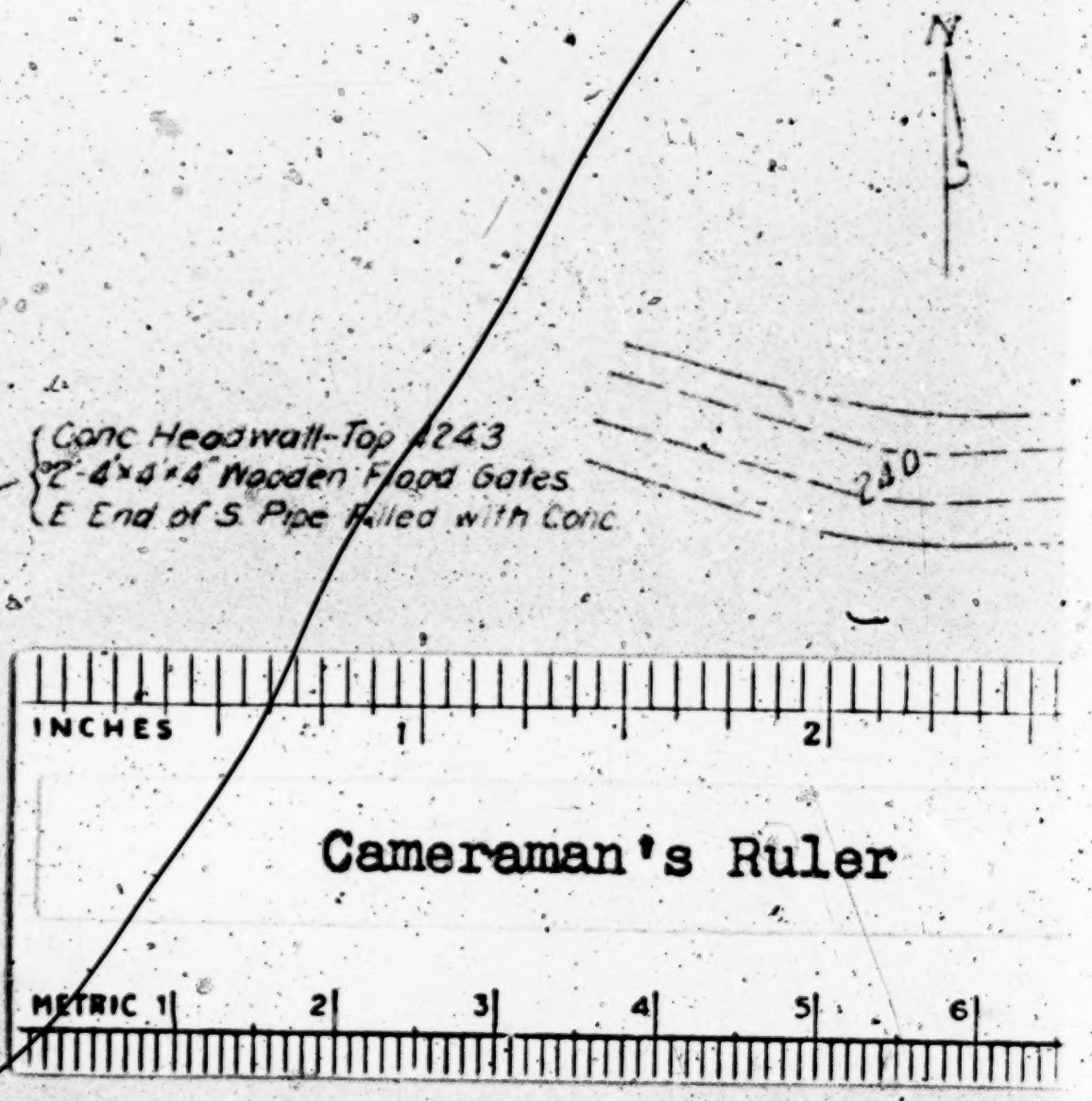
SCALE - HOR 1" = 20'
VERT 1" = 10'

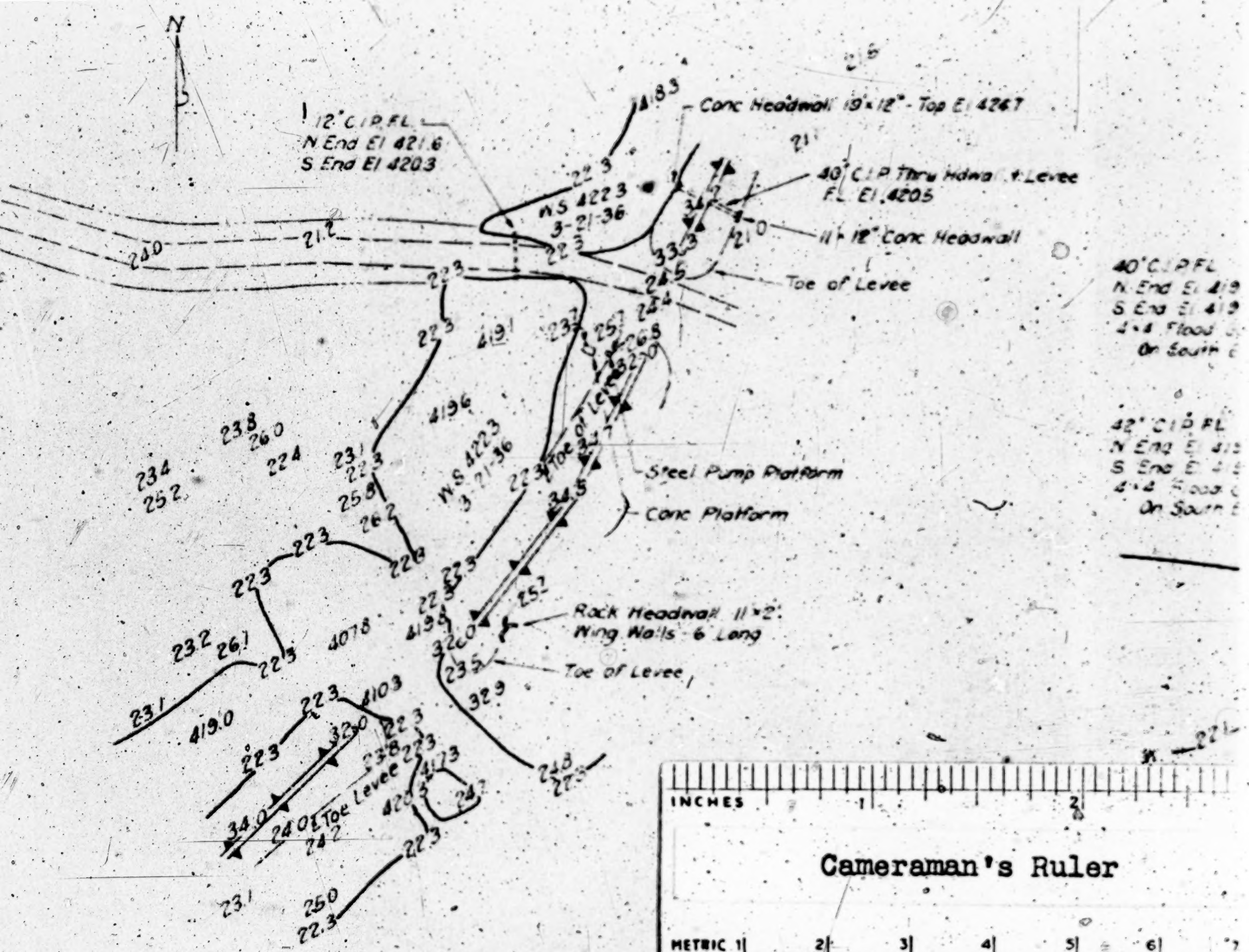
W-1



East End View of 3-40" C.I.P. the Left Pipe Being Filled with Concrete and the Other 2 Having 4'x4'x4" Wooden Flood Gates. Location of Pipes is Shown in Detail "A"

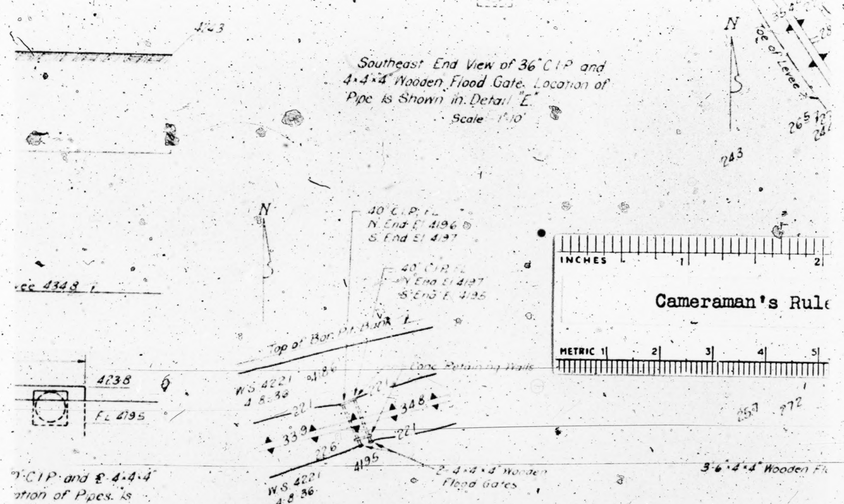
Scale - 1"=10

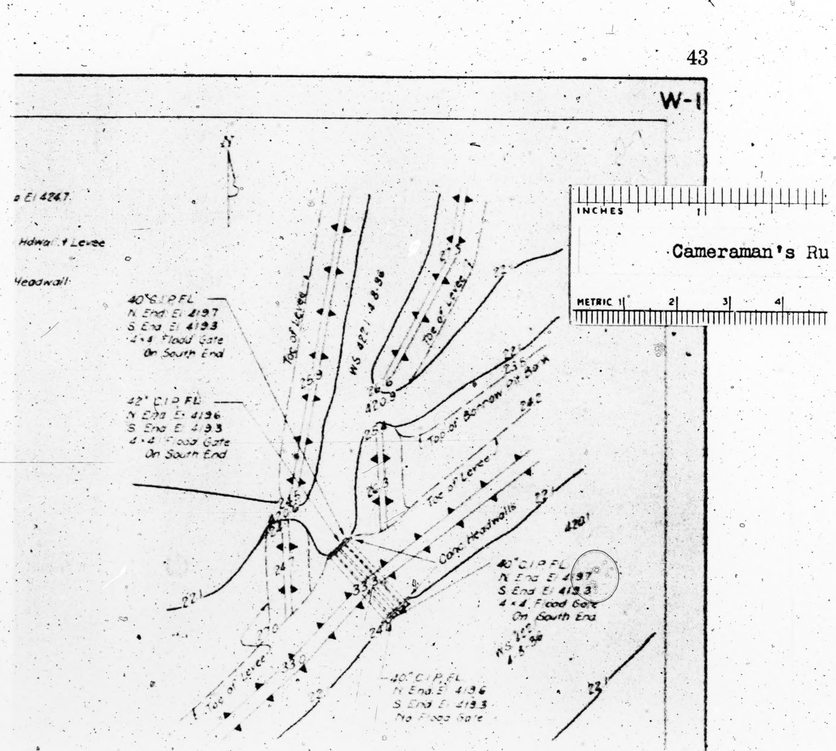


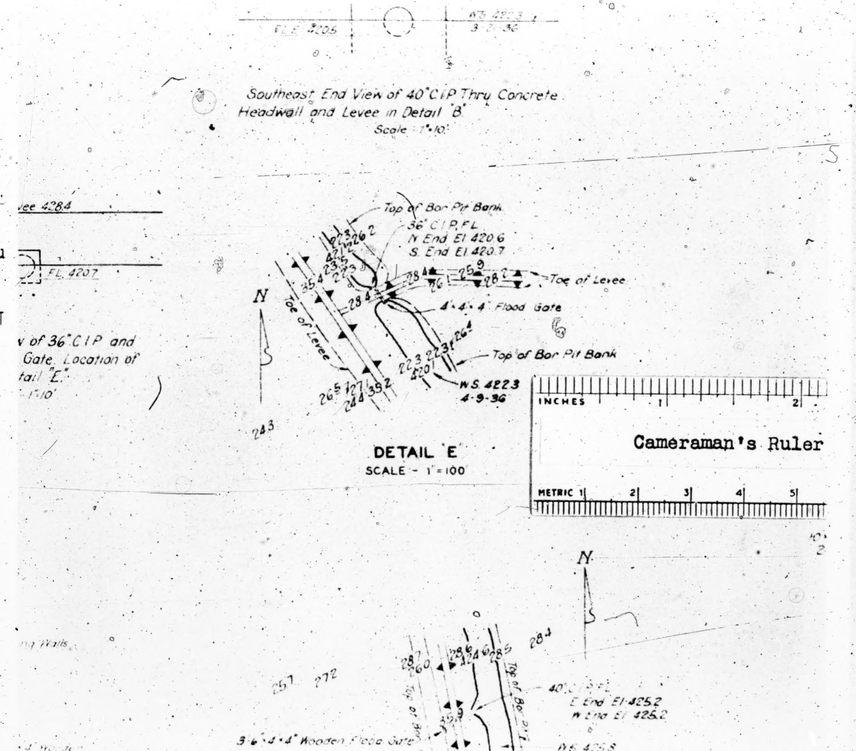


DETAIL B

SCALE - 1" = 100'


Southeast End View of 36"C.I.P. and 4'-4"x4" Wooden Flood Gate. Location of Pipe is Shown in Detail 'E'
Scale 1"=10'
40" C.I.P. F.L.
N. End El. 4196
S. End El. 4197
Top of Bor Pit Bank
Conc. Retaining Walls
W.S. 4221
4-8-36
4238
F.L. 4195
2-4'-4" Wooden Flood Gates
3'-6"x4'-4" Wooden Fl
DETAIL 'C'
SCALE - 1"=100'
INCHES
METRIC
Cameraman's Rule


W-1
Top of Levee
Headwall
40"C.I.P.F.L.
N. End El. 4197
S. End El. 4193
4'x4' Flood Gate
On South End
42" C.I.P. F.L.
N. End El. 4196
S. End El. 4193
4'x4' Flood Gate
On South End
W.S. 4221
4-8-36
Top of Borrow Pit
Conc. Headwalls
40"C.I.P.F.L.
N. End El. 4197
S. End El. 4193
4'x4' Flood Gate
On South End
40"C.I.P.F.L.
N. End El. 4196
S. End El. 4193
No Flood Gate
INCHES
METRIC
Cameraman's Ru


Southeast End View of 40"C.I.P. Thru Concrete Headwall and Levee in Detail 'B'
Scale 1"=10'
Top of Bor Pit Bank
36" C.I.P. F.L.
N. End El. 4206
S. End El. 4207
Toe of Levee
4'-4"x4' Flood Gate
Top of Bor Pit Bank
W.S. 4223
4-9-36
DETAIL 'E'
SCALE - 1"=100'
INCHES
METRIC
Cameraman's Ruler
40" C.I.P.F.L.
E. End El. 4252
W. End El. 4252
3'-6"x4'-4" Wooden Flood Gate

NS 4223
4-9-36

DETAIL E
SCALE - 1" = 100

Toe of Levee

INCHES 1 2

METRIC 1 2 3 4 5

• Cameraman's Rule

N

40" C I P
E End El 4252
W End El 4252

Top of Bor Pit

NS 4256
4-13-36

3'-4"x4'-4" Wooden Flood Gate

Top of Bor Pit

DETAIL F
SCALE - 1" = 100

Top of Levee 4359 ±

Approx Toe of Levee and Top of Bor Pit Bank 4290 ±

Approx ℄ Bor Pit 4260 ± El 4252

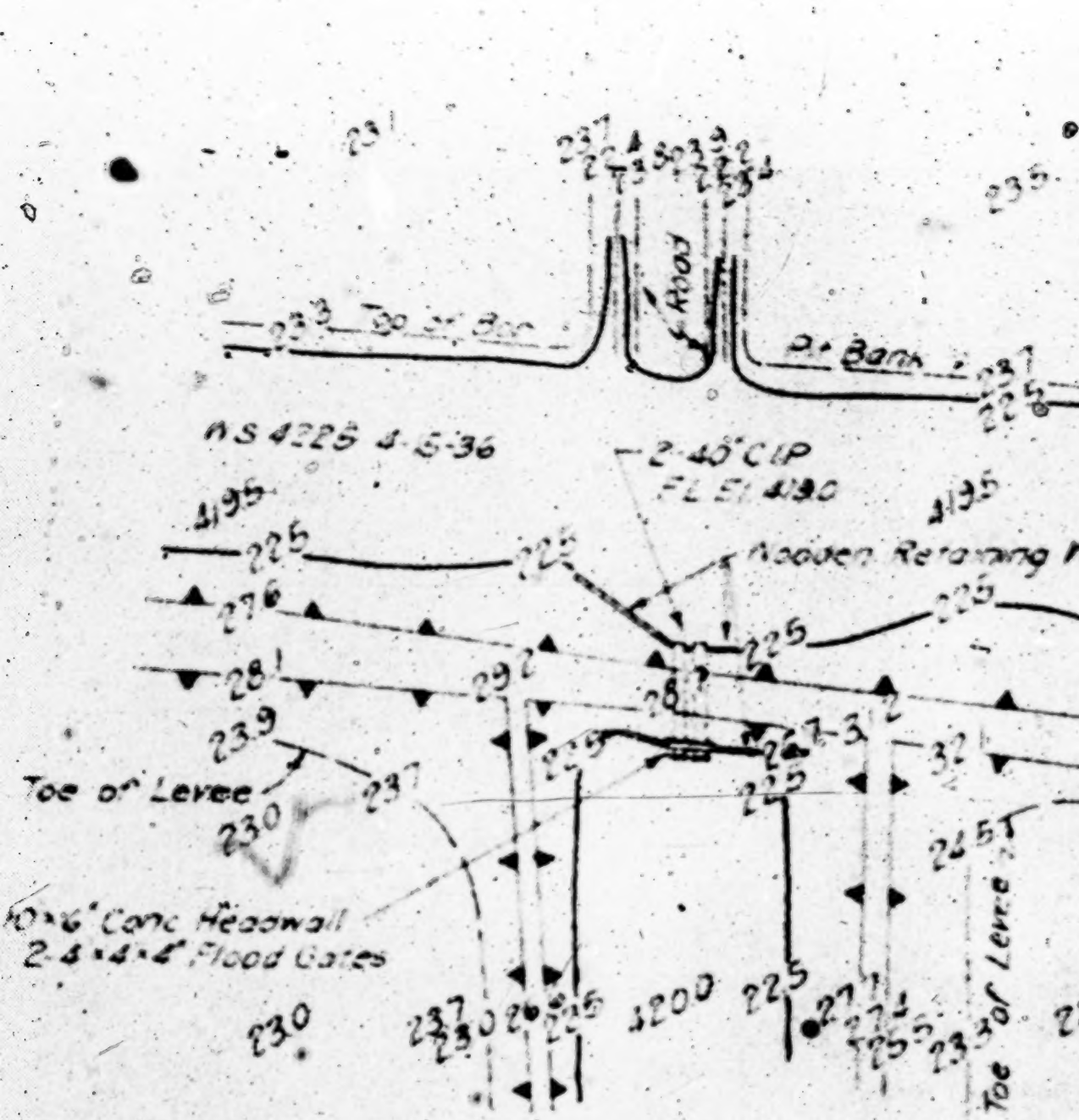
West End View of 40" C I P and 3'-6"x4'-4" Wooden Flood Gate. Location of Pipe is Shown in Detail "F"
Scale - 1"=10'

Sou
Flood

FOR LOC

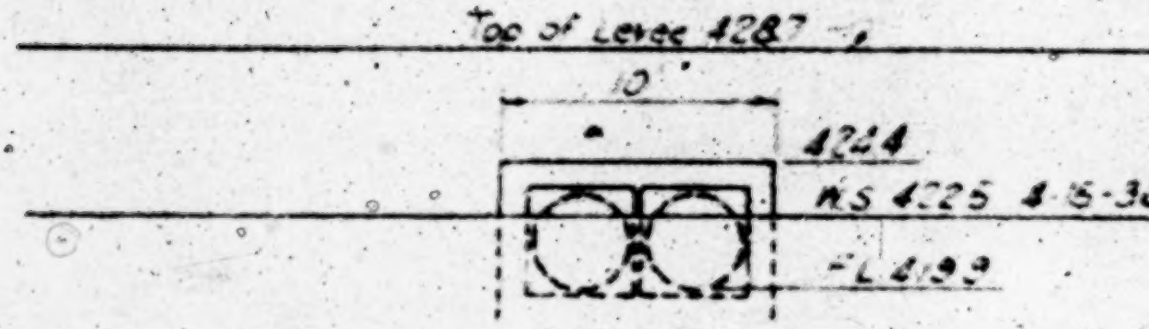
N

DETA



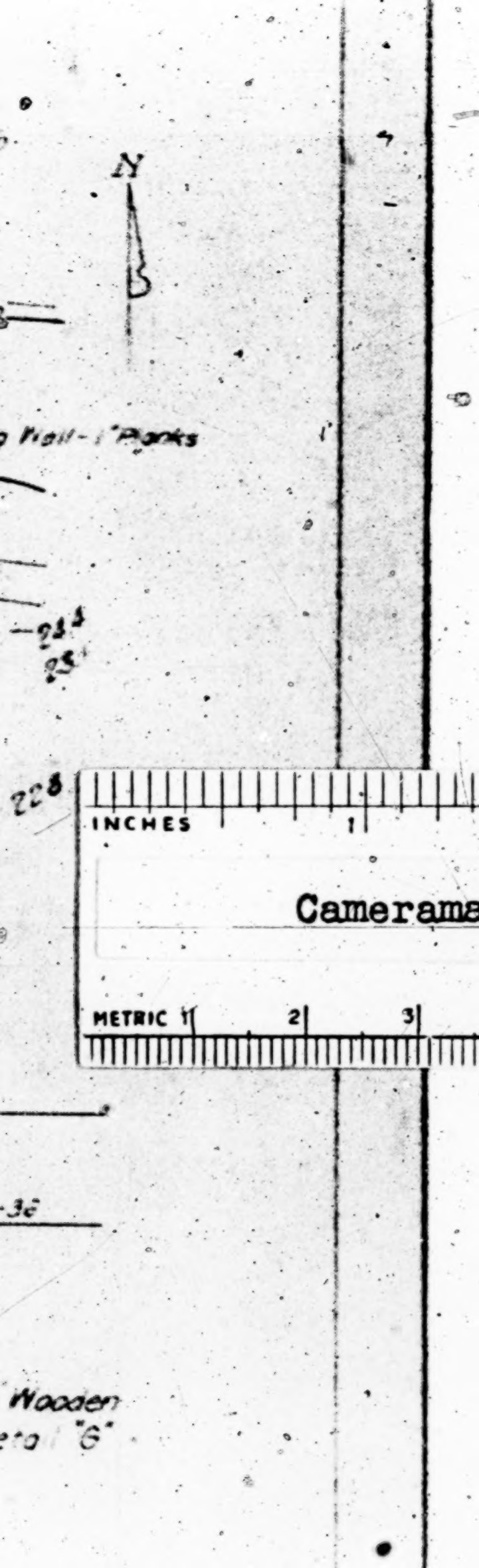
DETAIL 'G'

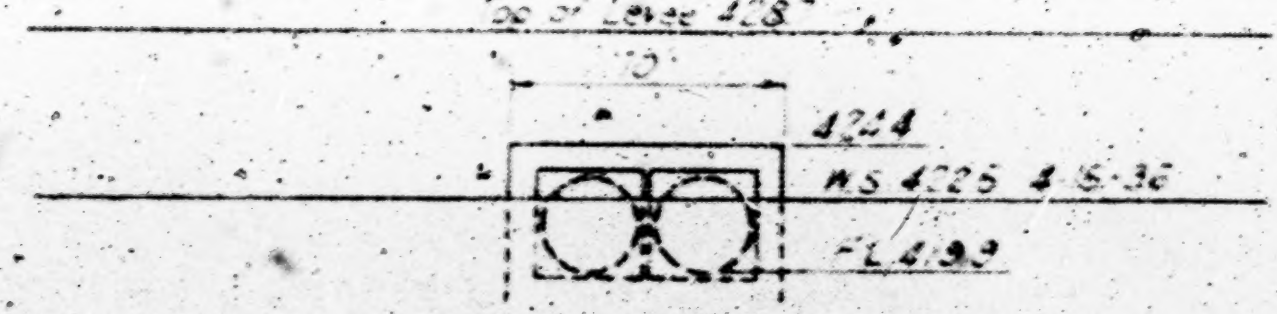
SCALE - 1"=50'



South End View of 2-40" CIP and 2-4'x4' W
Flood Gates Location of Pipes is Shown in Det

Scale - 1"=10'


N
INCHES
1
Camerama
METRIC
2
3
Wooden



South End View of 2-40" C.I.P. and 2-4'x4' Wooden Flood Gates Location of Pipes is Shown in Detail "B"

Scale - 1"=10

FOR LOCATION OF DETAILS AND SECTIONS SEE SHEET W

MISSISSIPPI RIVER
LOCK & DAM NO. 26
DETAILS OF WIEDMER DRAINAGE DISTRICT.

IN SHEETS SHEET NO.

SCALE AS SHOWN

U. S. ENGINEER OFFICE. ST. LOUIS, MO. DEC 17 1936

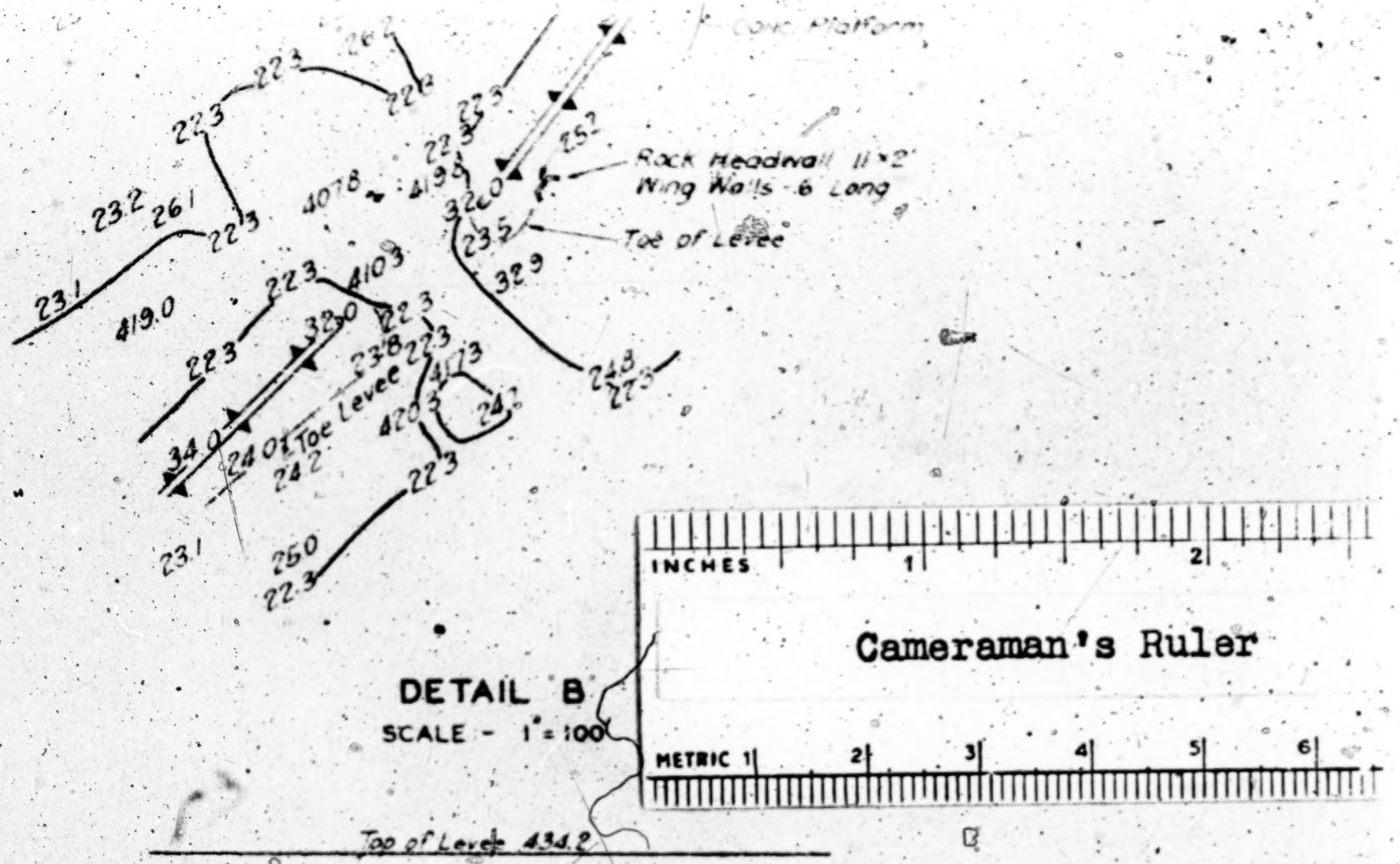
SUBMITTED M C Lewis ENGINEER

APPROVED [illegible] LT COL CORPS OF ENGINEERS DISTRICT ENGINEER

DRAWN BY L.T.B CHECKED BY G.W.H FILE NO

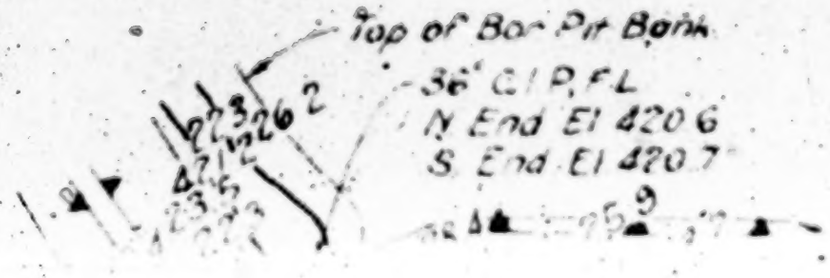
W-1

Government Exhibit No. 8



DETAIL B
SCALE - 1" = 100'

Southeast End View of 40" C.I.P. Thru Concrete Headwall and Levee in Detail "B"
Scale - 1"=10'



evee 428.4

FL 4207

In the Supreme Court of the United States

October Term, 1947

No. 621

UNITED STATES OF AMERICA, PETITIONER

v.

KANSAS CITY LIFE INSURANCE COMPANY, A CORPORATION

On Petition for a Writ of Certiorari to the Court of Claims

Stipulation dispensing with printing of certain exhibits

Plaintiff's Exhibit No. 12 and Defendant's Exhibit No. 4 are large maps of the land in suit. Because of their size and because of the colors thereon, it would be inordinately expensive to reproduce such exhibits.

It is therefore stipulated and agreed, subject to this Court's approval, by and between counsel for the respective parties hereto, that such exhibits need not be printed in the record but may be considered a part of the record, and may be referred to by the Court or by counsel in the petition, briefs, and on oral argument.

PHILIP B. PERLMAN,
Counsel for Petitioner.

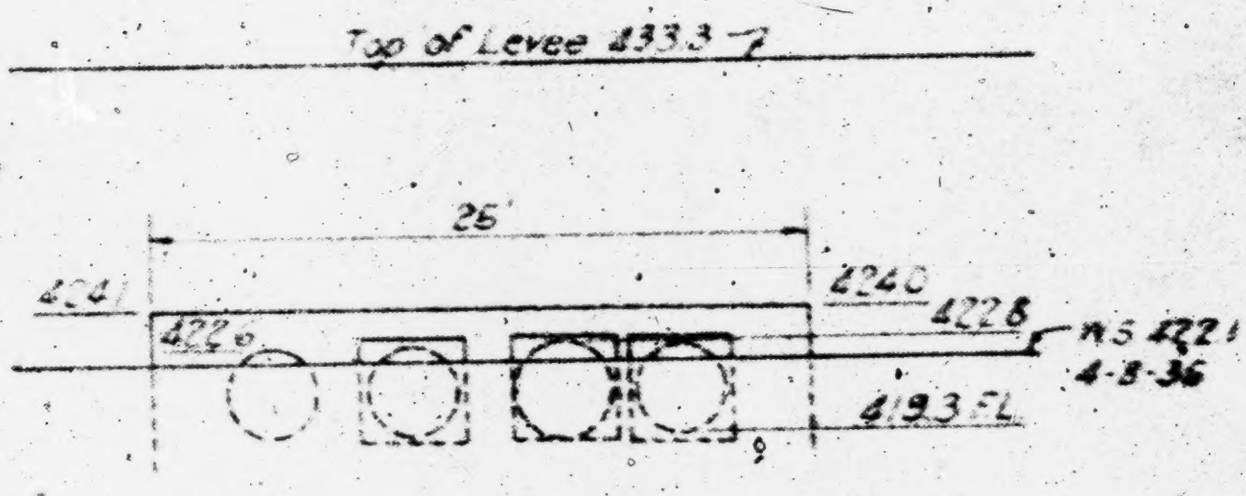
RAY B. LUCAS,
STANLEY BARRETT,
Counsel for Respondent.

U. S. GOVERNMENT PRINTING OFFICE 1948

N End El 4136
S End El 4193
No Flood Gate

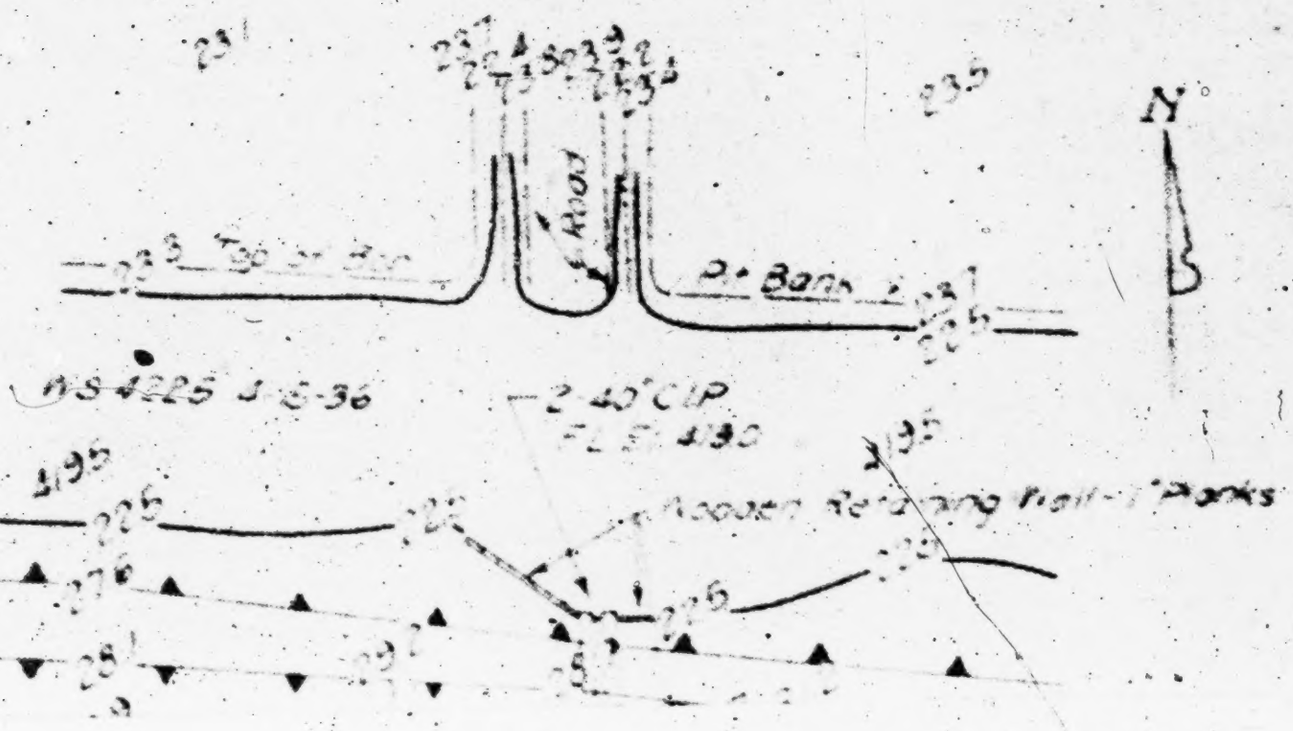
DETAIL 'D'

SCALE - 1"=50'



Southeast End Elev of 1-42" and 3-40" C I P and 2-8'x4' Wooden Flood Gates Location of Pipes is Shown in Detail 'D'

Scale 1"=10'



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Reasons for granting the writ	8
Conclusion	14

CITATIONS

Cases:

Christman v. *United States*, 74 F. 2d 112	11
Lynn v. *United States*, 110 F. 2d 586	11
Mills v. *United States*, 46 Fed. 738	11
Pumpelly v. *Green Bay Co.*, 13 Wall. 166	10
Transportation Co. v. *Chicago*, 99 U. S. 635	10
United States v. *Causby*, 328 U. S. 256	12
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592	8, 9
United States v. *Commodore Park*, 324 U. S. 386	9
United States v. *Cress*, 243 U. S. 316	7, 9, 10
United States v. *Lynah*, 188 U. S. 445	11
United States v. *Meyer*, 113 F. 2d 387, certiorari denied, 311 U. S. 706	11
United States v. *Sponenbarger*, 308 U. S. 256	10
United States v. *Willow River Co.*, 324 U. S. 499	8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 621

UNITED STATES OF AMERICA, PETITIONER

v.

KANSAS CITY LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered on December 1, 1947.

OPINION BELOW

The opinions of the Court of Claims (R. 35–40) is reported in 74 F. Supp. 653.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947 (R. 41). On February 2, 1948, the plaintiff's motion for a new trial was allowed and the conclusions of law were amended to include provision for interest (R. 41).

The jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the United States to pay compensation to an owner of land upon a non-navigable tributary of a navigable river where, for the purpose of improving navigation, the Government stabilizes the level of the river at the ordinary high-water mark and does not raise the level beyond that mark.

2. Whether there is a "taking" within the meaning of the Fifth Amendment when the Government's activities interfere with drainage of property without backing water onto the land.

3. Whether a finding that the Government has exercised the privilege, for which respondent is given compensation, of maintaining and operating a lock and dam some 25 miles downstream from respondent's land is sufficient to satisfy the requirement that the findings contain an accurate description of the property which the court concludes was taken from respondent.

STATEMENT

The judgment sought to be reviewed awards respondent the sum of $22,519.60 with interest from August 8, 1938, as a part of just compensation. To support its judgment the court below made findings which may be summarized as follows:

The United States erected Lock and Dam No. 26 on the Mississippi River near St. Charles, Missouri, for the purpose of providing a nine-foot navigable channel in the river, construction being completed in 1938 (Fdg. 4, R. 22). The respondent owns land known as the Baldwin Farm situated on Dardenne Creek, a nonnavigable stream which empties into the Mississippi about one and one-half miles below respondent's property and 25 miles above Dam No. 26 (Fdg. 2, R. 21–22). Prior to construction of the dam the ordinary high-water mark of the river at the mouth of Dardenne Creek was 420.4 feet (Fdg. 11, R. 27).[1] The average pool elevation maintained there from August 1938 to May 1941, after the dam was put in operation, was 420.4 feet (Fdg. 12, R. 27).[2] Respondent's farm varies in elevation from 422.7 feet to 428 feet and is protected by levees whose lowest elevation is 432.7 feet (Fdg. 11, R. 7). Hence, as the court found (Fdg. 13, R. 28), "the operation of defendant's dam and pool does not cause any flooding of plaintiff's land".

---

[1] For convenience, elevation will be referred to at the mouth of Dardenne Creek, although the gauge was located at Dixon's Landing about a mile away, since the court found that the elevations at those points are "about the same" (Fdg. 11, R. 27).

[2] The maximum authorized pool elevation at Dam 26, 25 miles downstream, is 419 feet. When the water is held at that elevation, the elevation at the mouth of Dardenne Creek varies from 419.1 to 422.5 feet, depending upon the volume of flow in the river (Fdg. 12, R. 27).

The injury for which compensation was awarded resulted from interference with surface and sub-surface drainage. Many years prior to the erection of Dam No. 26, a system of ditches and culvert pipes for lateral surface drainage had been constructed with a main carrying water to a borrow pit from which some 14 or 15 outlet pipes drained water into Dardenne Creek. (Fdg. 15, R. 29.) In 1943, two 48-inch pipes were laid for a similar purpose. These outlet drains are at an elevation of about 420 feet (Fdg. 17, R. 30). The bed of the creek is at elevation 410 to 413 feet and, prior to the erection of Dam No. 26, the water in the creek was two or three feet deep except during floods on the Mississippi or after heavy rainfall on the watershed of the creek (Fdg. 17, R. 30). As a result of operation of Dam No. 26, elevation of the water in the creek has been raised six or seven feet above the previous normal level "so that the creek water now backs into some of the outlet pipes in the plaintiff's levee,[3] thereby obstructing and delaying the drainage of surface water from plaintiff's land" (Fdg. 18, R. 31). The court also found (Fdg. 19, R. 31):

> The record does not disclose the extent to which the operation of Dam 26 obstructs or delays the drainage of surface water

[3] All of these pipes have swinging doors which close when the water in the creek rises to the level of the gates (Fdg. 15, R. 29).

> from the Baldwin Farm and there is no satisfactory proof with respect to the character or the cost of additional drainage and pumping facilities which will be required to offset the condition created by the operation of the dam. However, under controlled river conditions, the water is held on the land after a rain for longer periods than was formerly the case and it will be necessary to provide additional drainage and pumping facilities in order to farm the land.

Some surface water drains vertically into the sub-soil. Sub-surface drainage depends upon the fact that there is a stratum of water-bearing sand under the land, the top elevation of which, varies from 412 to 414 feet. The water in the sand is affected by the rise and fall of the Mississippi River and by rainfall on the land (Fdg. 16, (R. 30). However, the water table in the plaintiff's land is now, and always has been, higher than the river stage (Fdgs. 16, 20 R. 30, 32). Spring floods of the Mississippi and Dardenne Creek occur with about the same frequency after erection of Dam No. 26, as they did before. However, prior to erection of the dam, the river stage after the floods dropped to about 410 to 412 feet elevation where it remained for several months at the end and beginning of the year, thus furnishing drainage of the water from the land (Fdg. 19, R. 31-32). Now, the river is not allowed to drop to those extreme low levels, but is held at the

natural ordinary high-water mark. The result has been that drainage of underground water beneath a large area of the land has been almost entirely shut off, the opportunities formerly available for draining surface and sub-surface water are no longer available, and the water table is four to five feet higher than it formerly was during low stages of the Mississippi River (Fdg. 18, 19, 20, R. 31–32).

This change of conditions required the planting of different crops which mature in a shorter time and the yield and quality of corn and wheat decreased (Fdgs. 20, 21, R. 32). Before erection of the dam, a certain portion of the land was valuable only as a duck hunting preserve and its value has not been diminished by operation of the dam (Fdg. 24, R. 34). As to another tract the findings state (Fdg. 24, R. 34):

> Prior to August 8, 1938, the date on which full-pool stage above Dam 26 was first obtained, this 302.96 acres had a limited use for agricultural production, but there is no satisfactory proof of the exact amount by which the operation of the dam has impaired its market value. A reasonable estimate of the amount by which its value was reduced by August 8, 1938, as a result of the operation of Dam 26, is the sum of $1,694.60.

A third tract was diminished in market value by more than one-half of its former value and such

impairment amounted to $13,475.00 (Fdg. 26, R. 34–35). The value of a fourth tract was reduced $7,350,000 (Fdg. 27, R. 35). Finally, the court found (Fdg. 29, R. 35):

> The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

On the basis of these findings, judgment was entered on December 1, 1947, for $22,519.60. The conclusions of law were amended on February 2, 1940, to include an allowance of interest (R. 41).

The Court of Claims held that, by preventing surface or underground drainage and so converting land into a "pond or marsh," the Government took the land. For this holding, it cited no authority. It held further that since this land was located on a non-navigable tributary of a navigable stream (rather than on the navigable stream itself) the Government was bound to pay damages even though it had not raised the level of the navigable stream above its ordinary highwater mark. For this further holding, it relied on *United States* v. *Cress*, 243 U. S. 316. Judge Whitaker dissented.

REASONS FOR GRANTING THE WRIT

1. In *United States* v. *Willow River Co.*, 324 U. S. 499, this Court reaffirmed the settled rule that the United States is not required to compensate persons who are injured because the level of a navigable river is raised to ordinary high water mark, saying (p. 509): "Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation." In *United States* v. *Chicago, M., St. P. and P. R. Co.*, 312 U. S. 592, the basis of the doctrine was stated as follows (pp. 596–597):

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

It has never been suggested heretofore that this dominant power is limited by a requirement that compensation be paid to the extent that improvements in the bed of the river affect lands above high-water mark or upon non-navigable tribu-

taries. The majority of the court below concluded, however, that the decision in *United States* v. *Cress*, 243 U. S. 316, compelled such a result. We submit that the court below seriously misconceived the scope of the *Cress* decision, and that review by this court is therefore required.

In the *Cress* case it did not appear that the water level in that case was raised simply to high water mark. That the *Cress* case is not authority for the proposition that persons owning property on non-navigable streams have greater rights than do riparian owners on navigable streams is apparent from the statement in that opinion (p. 319): "In passing upon this contention [that the United States might perform the acts complained of in order to improve navigation without liability] we may assume, without however deciding, that the rights of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks." The majority of the court below did not suggest any logical reason for its distinction, and none can be given. The decisions in the *Willow River* and the *Chicago, M., St. P. & P. R. Co.* cases were based on the principle that riparian owners upon navigable streams do not have a right to have the water of the stream flow from their lands as in a state of nature, because the federal government has dominant servitude or power over the bed of the stream. Cf. *United States* v. *Commodore Park*, 324 U. S. 386,

391. No reason exists why owners of land abutting upon non-navigable tributaries of navigable rivers should be given greater rights. In both cases the same Governmental power to improve navigable waters is exercised. Hence, it is submitted that either (a) the court below misconstrued the *Cress* decision, or (b) if the *Cress* case is ambiguous on this score, it should be clarified so as to make it clear that the United States has dominant power to improve navigable streams not only as against riparian owners, but also as against owners of non-riparian property, when the water level has not been raised above the high water mark.

2. In any event, the damage to respondent's lands inflicted here does not constitute a taking within the meaning of the Fifth Amendment. The court below found that operation of the dam "does not cause any flooding of plaintiff's land" (Fdg. 13, R. 28). The injury results simply from interference with drainage, principally sub-surface. A "taking" occurs where there is a permanent flooding of fast lands outside the bed of the river or permanent liability to intermittent but inevitably recurring overflow. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Cress*, 243 U. S. 316. These decisions represent the "extremest qualification" of the rule that no recovery will be allowed for consequential damages. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *United States* v. *Sponenbarger*, 308 U. S. 256, 265. Thus,

in *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.) it was held that impairment of drainage was not a taking. This conclusion was approved by this Court in *United States* v. *Lynah*, 188 U. S. 445, 474. Again, in *Christman* v. *United States*, 74 F. 2d 112 (C. C. A. 7), the court held that the injury resulting from overflow of a non-navigable creek which was unable to discharge the water from spring freshets as quickly as it had before the Government built a dam which raised the pool level of the Ohio River was consequential and not recoverable. And, in *United States* v. *Meyer*, 113 F. 2d 387, 398 (C. C. A. 7) certiorari denied, 311 U. S. 706, the court held: "Whatever defendants' remedy may be in other forms of action, an interference with the subsurface drainage is not within taking under the eminent domain power." The same result was reached in *Lynn* v. *United States*, 110 F. 2d 586 (C. C. A. 5).

Ignoring all of these decisions, the opinion below simply stated (R. 38) that the court saw no real difference between flooding land with water and converting it into a pond or marsh by preventing drainage. But, as the findings of the court recognized, there was no permanent and complete destruction of respondent's lands but merely some partial injury to them, limiting their use for growing certain crops. The decision below represents, we submit, a failure to recognize the well-settled distinction between "taking" of property and damaging of it, and is in conflict

with the cases cited above which hold that interference with drainage constitutes damage and not a taking.

3. The opinion of the court below discussed the question "whether there has been a taking of the plaintiff's land within the meaning of the Constitution," reasoned that one of the valuable incidents of plaintiff's ownership was that surface and underground water passed off his land, and concluded that the Government was not privileged "to 'take' without compensation the interest which we have discussed above in the plaintiff's land" (R. 39). The entire use of respondent's land was not destroyed and hence there was no taking of fee title. Apparently, it was the court's theory that the United States had taken some sort of a right to have the land drained by the natural changes in the levels of the Mississippi River. The findings, however, do not describe any such right. But as this Court held in *United States* v. *Causby,* 328 U. S. 256, 267, "an accurate description of the property taken is essential, since that interest vests in the United States" and the deficiency of findings in this regard may not be rectified by statements in the opinion. In the instant case, there is no finding that the United States had taken an easement or any analogous interest in respondent's land. The only finding purporting to describe what the Government is required to pay for states as follows (R. 35):

> The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

This constitutes simply a statement that the Government had the "privilege" of carrying on a governmental activity twenty-five miles downstream from respondent's land. But the right of the United States to engage in the governmental activity of improving navigation arises from its constitutional powers, not as the result of any seizure from the respondent. The quoted finding, therefore, fails to satisfy the requirement that there be "an accurate description of the property taken." An essential finding to support the judgment is, therefore, lacking.

4. The questions presented are of great general importance. In almost all instances when navigable rivers are improved, nonnavigable tributaries are in some degree affected since water insists on finding its own level. An authoritative determination of the question is desirable not only as a precedent to be followed by the courts in determining similar claims but, perhaps more important, as a guide to administrative officers and

Congress in estimating the probable cost of river improvement projects and in planning operation of them in the most economical manner. Since almost every river improvement will affect, in some degree, drainage from lands in the watershed—indeed that is one of the primary objectives of both navigation and flood control projects—adoption of the view taken by the court below will to a great extent render the Government's navigation servitude illusory.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1948.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	10
Summary of argument	10
Argument:	
I. The United States is not liable here since it did not raise the waters of the navigable stream above the ordinary high-water mark	13
A. Lands below high-water mark are subject to a dominant servitude in the interests of navigation, whose exercise does not give rise to compensation	13
B. Nothing in *United States* v. *Cress* requires an award of compensation	17
II. The judgment is in any event invalid for lack of a finding as to what property interest of respondent's was taken by the United States	26
III. The judgment below cannot be supported on the theory that Congress has assumed liability to respondent	30
Conclusion	34

CITATIONS

CASES:

Bedford v. *United States*, 192 U. S. 217	21
Christman v. *United States*, 74 F. 2d 112	21
Cubbins v. *Mississippi River Commission*, 241 U. S. 351	21
Gibson v. *United States*, 166 U. S. 269	20, 21
Hood v. *United States*, 49 C. Cls. 669	20
Horstmann Co. v. *United States*, 257 U. S. 138	21
Hughes v. *United States*, 230 U. S. 24	21
Jacobs v. *United States*, 290 U. S. 13	21
Jackson v. *United States*, 230 U. S. 1	21
Kelley's Creek and N. W. R. Co. v. *United States*, 100 C. Cls. 396	14
Langnes v. *Green*, 282 U. S. 531	33
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U. S. 82	16
Lynn v. *United States*, 110 F. 2d 586	20
Manigault v. *Springs*, 199 U. S. 473	21

	Page
Mills v. *United States*, 46 Fed. 738	22
Mitchell v. *United States*, 267 U. S. 341	13, 31, 32
Monongahela Navigation Co. v. *United States*, 184 U. S. 312	16
Philadelphia Co. v. *Stimson*, 223 U. S. 605	28
Pine Hill Co. v. *United States*, 259 U. S. 191	30
Pixley v. *Clark*, 35 N. Y. 520	19
Pumpelly v. *Green Bay Company*, 13 Wall. 166	21
Sanguinetti v. *United States*, 264 U. S. 146	21, 22
Scranton v. *Wheeler*, 179 U. S. 141	20
Transportation Co. v. *Chicago*, 99 U. S. 635	21
United States v. *American Ry. Exp. Co.*, 265 U. S. 425	30, 33
United States v. *Appalachian Power Co.*, 311 U. S. 377	21, 23
United States v. *Causby*, 328 U. S. 256	12, 17, 21, 26, 28
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	20, 23, 24
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592	8, 11, 14, 17, 20, 23, 24
United States v. *Cress*, 243 U. S. 316	8, 11, 15, 21, 23, 25
United States v. *Esnault-Pelterie*, 299 U. S. 201	26
United States v. *Kelly*, No. 718, Oct. T., 1916	16
United States v. *Lynah*, 188 U. S. 445	11, 15, 21
United States v. *Meyer*, 113 F. 2d 387, certiorari denied, 311 U. S. 706	20
United States v. *Rio Grande Irrigation Co.*, 174 U. S. 690	28
United States v. *Seminole Nation*, 299 U. S. 417	26
United States v. *Sponenbarger*, 308 U. S. 256	21
United States v. *Wilbur*, 283 U. S. 414	31
United States v. *Williams*, 188 U. S. 485	21
United States v. *Willow River Co.*, 324 U. S. 499	11, 14, 15, 17, 20, 22, 24
United States v. *Zazove*, 334 U. S. 602	30
Willow River Power Co. Inc. v. *United States*, 101 C. Cls. 222	14

CONSTITUTION:

Art. I, Sec. 8	27
Fifth Amendment	29

STATUTES:

Act of August 26, 1937, 50 Stat. 844, 848	9
Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151 (33 U. S. C. 403)	27

MISCELLANEOUS:

Rivers and Harbors Committee Document No. 34, 75th Cong.	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 26

THE UNITED STATES OF AMERICA, *Petitioner*

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion and dissenting opinion in the Court of Claims (R. 35-40) are reported at 109 C. Cls. 555.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1947 (R. 41). On February 2, 1948, the plaintiff's motion for a new trial was allowed and the conclusions of law were amended

to include provision for interest (R. 41). The petition for a writ of certiorari was filed on February 24, 1948, and was granted on May 3, 1948 (R. 46). The jurisdiction of this Court rests upon section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. 288 (b).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the United States to pay compensation to an owner of land upon a non-navigable tributary of a navigable river where, for the purpose of improving navigation, the Government stabilizes the level of the river at the ordinary high-water mark and does not raise the level beyond that mark.

2. Whether a finding that the Government has exercised the privilege, for which respondent is given compensation, of maintaining and operating a lock and dam some 25 miles downstream from respondent's land, is sufficient to satisfy the requirement that the findings contain an accurate description of the property which the court concludes was taken from respondent.

3. Whether Congress, by an act "modifying" the project "in accordance with the recommendation of the District Engineer" that "authority be granted the Secretary of War to acquire" 1,254 acres of "low-lying lands" and to provide in an unspecified manner for the "tiling and ditching" of 366 additional acres of other land and author-

izing an appropriation for that purpose, created a right in the plaintiff to compensation for damages to 1,710 acres of land, the title to which has not passed and will not pass to the United States.

STATUTE INVOLVED

The relevant portion of the Act of August 26, 1937, 50 Stat. 844, 848, is set out in the Statement, *infra*, pp. 9-10.

STATEMENT

The findings of the Court of Claims may be summarized as follows:

The United States erected Lock and Dam No. 26 on the Mississippi River near St. Charles, Missouri, for the purpose of providing a nine-foot navigable channel in the river, construction being completed in 1938 (Fdg. 4, R. 22). The respondent owns land known as the Baldwin Farm situated on Dardenne Creek, a non-navigable stream which empties into the Mississippi about one and one-half miles below respondent's property and 25 miles above Dam No. 26 (Fdg. 2, R. 21-22). Prior to construction of the dam the ordinary high-water mark of the river at the mouth of Dardenne Creek was 420.4 feet (Fdg. 11, R. 27).[1] The average pool elevation maintained there from August 1938 to May 1941, after the dam was put

[1] For convenience, elevation will be referred to at the mouth of Dardenne Creek, although the gauge was located at Dixon's Landing about a mile away, since the court found that the elevations at those points are "about the same" (Fdg. 11, R. 27).

in operation, was 420.4 feet (Fdg. 12, R. 27).[2] Respondent's farm varies in elevation from 422.7 feet to 428 feet and is protected by levees whose lowest elevation is 432.7 feet (Fdg. 11, R. 7). Hence, as the court found (Fdg. 13, R. 28), "the operation of defendant's dam and pool does not cause any flooding of plaintiff's land."

The injury for which compensation was awarded resulted from interference with surface and subsurface drainage. Many years prior to the erection of Dam No. 26, a system of ditches and culvert pipes for lateral surface drainage had been constructed with a main carrying water to a borrow pit from which some 14 or 15 outlet pipes drained water into Dardenne Creek. (Fdg. 15, R. 29.) In 1943, two 48-inch pipes were laid for a similar purpose. These outlet drains are at an elevation of about 420 feet (Fdg. 17, R. 30). The bed of the creek is at elevation 410 to 413 feet and, prior to the erection of Dam No. 26, the water in the creek was two or three feet deep except during floods on the Mississippi or after heavy rainfall on the watershed of the creek (Fdg. 17, R. 30). As a result of operation of Dam No. 26, elevation of the water in the creek has been raised six or seven feet above the previous normal level "so that the creek water now backs into some of

---

[2] The maximum authorized pool elevation at Dam 26, 25 miles downstream, is 419 feet. When the water is held at that elevation, the elevation at the mouth of Dardenne Creek varies from 419.1 to 422.5 feet, depending upon the volume of flow in the river (Fdg. 12, R. 217).

the outlet pipes in the plaintiff's levee,[3] thereby obstructing and delaying the drainage of surface water from plaintiff's land" (Fdg. 18, R. 31). The court also found (Fdg. 19, R. 31), that——

> The record does not disclose the extent to which the operation of Dam 26 obstructs or delays the drainage of surface water from the Baldwin Farm and there is no satisfactory proof with respect to the character or the cost of additional drainage and pumping facilities which will be required to offset the condition created by the operation of the dam. However, under controlled river conditions, the water is held on the land after a rain for longer periods than was formerly the case and it will be necessary to provide additional drainage and pumping facilities in order to farm the land.

Some surface water drains vertically into the sub-soil. Sub-surface drainage depends upon the fact that there is a stratum of water-bearing sand under the land, the top elevation of which varies from 412 to 414 feet. The water in the sand is affected by the rise and fall of the Mississippi River and by rainfall on the land (Fdg. 16, R. 30). However, the water table in the respondent's land is now, and always has been, higher than the river stage (Fdgs. 16, 20, R. 30, 32), hence water from

---

[3] All of these pipes have swinging doors which close when the water in the creek rises to the level of the gates (Fdg. 15, R. 29).

the river has not been forced under respondent's land. Spring floods of the Mississippi and Dardenne Creek occur with about the same frequency after erection of Dam No. 26, as they did before. However, prior to erection of the dam, the river stage after the floods dropped to about 410 to 412 feet elevation, where it remained for several months at the end and beginning of the year, thus furnishing drainage of the water from the land (Fdg. 19, R. 31-32). At the present time, the river is not allowed to drop to those extreme low levels, but is held at the natural ordinary high-water mark. The result has been that drainage of underground water beneath a large area of the land has been almost entirely shut off, the opportunities formerly available for draining surface and sub-surface water are no longer available, and the water table is four to five feet higher than it formerly was during low stages of the Mississippi River (Fdgs. 18, 19, 20, R. 31-32).

This change of conditions required the planting of different crops which mature in a shorter time and the yield and quality of corn and wheat decreased (Fdgs. 20, 21, R. 32). Before erection of the dam, a certain portion of the land was valuable only as a duck hunting preserve and its value has not been diminished by operation of the dam (Fdg. 24, R. 34). As to another tract the findings state (Fdg. 24, R. 34):

> Prior to August 8, 1938, the date on which full-pool stage above Dam 26 was first obtained, this 302.96 acres had a limited use for agricultural production, but there is no satisfactory proof of the exact amount by which the operation of the dam impaired its market value. A reasonable estimate of the amount by which its value was reduced by August 8, 1938, as a result of the operation of Dam 26, is the sum of $1,694.60.

A third tract was diminished in market value by more than one-half of its former value and such impairment amounted to $13,475.00 (Fdg. 26, R. 34-35). The value of a fourth tract was reduced $7,350.00 (Fdg. 27, R. 35). Finally, the court found (Fdg. 29, R. 35):

> The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

On the basis of these findings, judgment was entered on December 1, 1947, for $22,519.60. The conclusions of law were amended on February 2, 1940, to include an allowance of interest from August 8, 1938, as a part of just compensation (R. 41).

The Court of Claims held that, by preventing surface or underground drainage and so convert-

ing land into a "pond or marsh," the Government took the land (R. 37-38). For this holding, it cited no authority. It held further that since respondent's land was located on a non-navigable tributary of a navigable stream, rather than on the navigable stream itself, the Government was bound to pay damages even though it had not raised the level of the navigable stream above its ordinary high-water mark (R. 38-39). For this further holding, it relied on *United States* v. *Cress*, 243 U. S. 316. Judge Whitaker dissented on the ground that, since the water of the navigable stream had not been raised above ordinary high-water mark, there was no liability on the part of the United States in view of the rule of *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592.

Respondent also asserted a claim that Congress had consented to its recovery in the amount of $93,540.00 (R. 12). The Court of Claims found the facts as to this claim to be as follows: In 1932 a Congressional committee requested a determination of damages which might be caused to lands bordering the river by seepage and backwater (Fdg. 5, R. 22). A report submitted in 1934, which refers to respondent's land under the name "Wiedmer Chemical Co. Drainage District," as do later reports, concluded that no adverse effect would be caused such lands by the proposed improvement (Fdg. 6, R. 22-23). In 1935 the House Committee requested estimates of the exact

damages that would be caused by execution of the project (Fdg. 7, R. 23). A detailed report dated June 1, 1936, which appears in Rivers and Harbors Committee Document No. 34, 75th Congress, was made by the District Engineer.[4] After a discussion of various factors, the report concluded (Fdg. 8, R. 25):

> It is therefore recommended that authority be granted the Secretary of War to acquire the low-lying lands in the above seven districts, for the United States in lieu of payment to the districts of the capitalized cost of maintaining their present drainage status and that the total estimated cost of $624,645 be made available therefor immediately.

This report was approved by the Division Engineer, the Board of Engineers for Rivers and Harbors, and by the Chief of Engineers (Fdg. 8, R. 25).

The Act of August 26, 1937, 50 Stat. 844, 848, provided in part:

> Mississippi River between Missouri River and Minneapolis, Minnesota: The existing project is hereby modified in accordance with the recommendation of the District Engineer

---

[4] Apparently the District Engineer had made a preliminary report unfavorable to respondent, because in January 1937 respondent appealed to the Board of Engineers for Rivers and Harbors, stating that the District Engineer had said that there would be no damages to respondent's property (Fdg. 10, R. 26-27).

in the report submitted in Rivers and Harbors Committee Document Numbered 34, Seventy-fifth Congress.

The court below rejected respondent's claim based upon the 1937 Act on the ground that, while it might have constituted an authorization to acquire some of respondent's land by eminent domain and to spend money in tiling and ditching another part of it, the Act did not constitute a Congressional waiver of immunity from suit or a confession of liability for the consequences of building the dam (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that any property had been taken from respondent;

2. In holding that impairment of drainage in the circumstances of the present case constituted a taking.

3. In failing to define what property interest was taken.

4. In entering judgment against the United States.

SUMMARY OF ARGUMENT

I

The navigation improvement project in the instant case has not raised the level of the river above high-water mark. Hence no question is here

presented as to whether a cause of action exists for the taking of intangible riparian rights when the river level is raised above high-water mark.

It is well settled that when the Government confines its activities to the bed of a navigable stream and does not flood fast lands there is no liability because there is no taking. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Willow River Co.*, 324 U. S. 499. This is so because the Government's paramount power over navigable streams extends to the entire bed of the stream. The decision of this Court in *United States* v. *Chicago M. St. P. & P. R. Co.*, 312 U. S. 592, specifically overruled so much of *United States* v. *Lynah*, 188 U. S. 445, as held that recovery might be had for the flooding of lands below high-water mark. Since the water level was not raised above high-water mark here, there is no liability.

The decision in *United States* v. *Cress*, 243 U. S. 316, does not support a contrary view. Even if it be assumed, *arguendo*, that an impairment of drainage is equivalent to a flooding of land (a conclusion of the Court of Claims which we believe to be erroneous), the *Cress* decision does not justify recovery by respondent. The *Cress* case probably involved a raising of the water level above high-water mark. If it did not, then its authority did not survive the demise of the *Lynah* case on which it was based. No distinction can be based upon the fact that respondent's land was located

on a non-navigable tributary of a navigable stream. The *Cress* case does not purport to hold that such owners have greater rights than do riparian owners on navigable streams. The power of the Federal Government to exercise its dominant servitude over the bed of the stream cannot be affected by the location or character of the landowners who may be disadvantaged by such action.

II

The Court of Claims was under a duty to make a finding containing an "accurate description of the property taken." *United States* v. *Causby*, 328 U. S. 256. No such finding was made. The only finding of this nature was Finding 29 which *related to the privilege exercised by the Government*. But the United States did not take from respondent the "privilege" of carrying on the governmental activity of improving navigation. And, since there was no finding describing a property interest in respondent's land, there was no "accurate description of such interest." The failure to make a finding describing the interest taken and the nature of Finding 29 emphasize the fact that there has been no taking but merely an exercise of the Federal power to improve navigation.

III

Respondent may not support the judgment below on the ground that the Act of August 26, 1937,

constituted a confession of liability in the amount of $93,540. The Act simply authorized the Secretary of War, if he believed it advisable, to acquire in fee 1,254 acres of land and in addition to ditch and tile 366 acres. It did not direct the Secretary to do so, nor did it direct payment of any amount to respondent. The $93,540 represented simply an estimate of the cost of such acquisition and ditching and did not purport to establish the land value. The decision in *Mitchell v. United States*, 267 U. S. 341, is conclusive against respondent's claim under this heading.

Moreover, since the present argument would enlarge the scope of the judgment below rather than merely support it on a ground rejected by the Court of Claims, it cannot now be urged in view of respondent's failure to file a cross-petition for certiorari.

ARGUMENT

I. THE UNITED STATES IS NOT LIABLE HERE SINCE IT DID NOT RAISE THE WATERS OF THE NAVIGABLE STREAM ABOVE THE ORDINARY HIGH-WATER MARK

A. Lands below high-water mark are subject to a dominant servitude in the interests of navigation, whose exercise does not give rise to compensation

The crucial fact in this case, that the average pool elevation maintained after erection of the Government's navigation dam was the same as the ordinary high-water mark of the river, viz., 420.4 feet (Edgs. 11, 12, R. 27), narrows the legal issues here, and underscores the error of the court below.

It narrows the issues, because it makes unnecessary consideration of the question whether, where the United States has raised the flow of the river above ordinary high-water mark in the interest of navigation, there is a cause of action in respect of the impairment of intangible riparian rights such as the right to the flow of a stream in its natural condition, or the right to subsurface drainage, or the right of access to the waters. Here no such rise has taken place.

And it underscores the error committed below, because the law is clear that where, as here, the activities of the Government have been confined to the bed of a navigable stream, and where, as the court below found, the operation of the dam does not cause any flooding of the land (Fdg. 13, R. 28), there is no liability because there is no taking. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Willow River Co.*, 324 U. S. 499. And, until the decision in the instant case, that was also the rule in the court below. *Willow River Power Co., Inc.* v. *United States*, 101 C. Cls. 222, 228; *Kelley's Creek and N. W. R. Co.* v. *United States*, 100 C. Cls. 396.

The basis of this rule is that the paramount power of the Federal Government over navigable streams extends to the entire bed of a stream, which includes all lands below the high-water mark. As this Court said in *United States* v. *Chicago, M., St. P. & P. R. Co.*, *supra*, 312 U. S. at 596-597,

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing *Scranton* v. *Wheeler*, 179 U. S. 141, 143, 144; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 263; *Willink* v. *United States*, 240 U. S. 572, 580; *Delaware R. Co.* v. *Weeks*, 293 Fed. 114, 120 [D. Del.]; *Barr* v. *Spalding*, 46 F. 2d 798, 800 [W. D. Ky.]; *Marret* v. *United States*, 82 C. Cls. 1, 13; *United States* v. *Meyer*, 113 F. 2d 387, 398 [C. C. A. 7.]] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

Accordingly, the Court overruled so much of *United States* v. *Lynah*, 188 U. S. 445, as held that a flooding of lands between the high and low water lines gave rise to an implied promise to pay just compensation, 312 U. S. at 598.

Similarly, in *United States* v. *Willow River Co.*, 324 U. S. 499, after referring to many authorities, this Court said (p. 509):

> It is conceded that the riparian owner has no right as against improvements of navigation to maintenance of a level below high-water mark, but it is claimed that there is a riparian right to use the stream for run-off

> of water at this level. High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid. But the award here does not purport to compensate a flooding of fast lands or impairment of their value. Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *Willink* v. *United States*, 240 U. S. 572.

In view of these late authorities, it follows that if *United States* v. *Cress*, 243 U. S. 316,[5] involved an award of compensation arising out of a raising of the navigable stream up to the high water mark, then, obviously, its authority did not survive the demise of the *Lynah* case, on which it rested. 243 U. S. at 325, 326, 328, 329.[6] More likely, however, as the dissenting judge below thought (R. 40), the *Cress* case involved a raising of the Kentucky River above high water mark,[7]

---

[5] The opinion entitled "*United States* v. *Cress*" also deals with the companion case of *United States* v. *Kelly*, No. 718, and it is with the holding in the latter case (243 U. S. at 329-330) that we are here concerned.

[6] The *Kelly* portion of the *Cress* opinion also relied (243 U. S. at 320, 326) on *Monongahela Navigation Co.* v. *United States*, 184 U. S. 312, which was subsequently restricted in *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 89, as resting upon an estoppel arising out of its peculiar facts.

[7] The meager record in the *Kelly* case, No. 718, Oct. T., 1916, sheds no light on the point.

in which event it would be inapplicable here. For, as this Court has already observed, the question of liability for improvements to navigation which affect the land between high and low water marks was not discussed in the *Cress* opinion, which must accordingly "be confined to the facts there disclosed." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 597; see also *United States* v. *Willow River Co.*, 324 U. S. 499, 507.

The court below admitted that the two cases just cited "may indicate that the *Cress* case does not have a good prospect of survival. But," observed the Court of Claims, "it has not been overruled" (R. 39), and it relied on the circumstance that "In the instant case, as in the *Cress* case, the harm was done by the raising of the water level in a nonnavigable stream" (*ibid.*). Accordingly it found a taking and awarded damages.

This approach, as Judge Whitaker was at pains to point out (R. 39-40), completely misapprehends the rationale of the *Cress* case and what was actually decided there, as analysis of the reasoning of the court below in the present case will show.

B. Nothing in *United States* v. *Cress* requires an award of compensation here

The Court of Claims started with the premise that the holding in *United States* v. *Causby*, 328 U. S. 256, demonstrated (R. 37) that "the idea of a 'taking' in the constitutional sense is not limited to the assertion of one of a closed list of

normal interests in land." It then argued that (R. 37-38)——

> * * * One of the valuable incidents of the plaintiff's ownership, before the dam was built, was that the surface and underground water passed off his land leaving it available for profitable agriculture. That incident has now been impaired, in order to benefit navigation on the Mississippi. It is the kind of an incident of ownership that could have been granted by the plaintiff to the Government or a neighbor, the privilege of holding surface and underground water in the plaintiff's land, to its detriment as agricultural land. Such a grant would have created a burden in rem upon the plaintiff's land, which would have passed to subsequent owners and bound them. We see no real difference between burdening the land by artificially flooding it with water, which has often been held to be a taking,* and converting it into a pond or a marsh by preventing the surface water which falls on it or flows on it from higher land from leaving it by either surface or underground drainage. We think that the fact that the change in the nature of the plaintiff's land has been accomplished principally by erecting a water barrier at its margin, preventing egress of water, rather than by causing the invasion of the land by water from outside, should not be the deciding factor.

* [Footnote in original:] *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Welch*, 217 U. S. 333; *United States* v. *Dickinson*, 152 F. (2d) 865, aff'd 67 S. Ct. 1382.

And it concluded (R. 39)——

> * * * In the instant case, as in the *Cress* case, the harm was done by the raising of the water level in a nonnavigable stream, and the Government was not privileged, in the improvement of the navigability of the Mississippi, to "take" without compensation the interest which we have discussed above in the plaintiff's land on Dardenne Creek.

This reasoning involves two demonstrable fallacies:

(1) Assuming *arguendo* that the prevention of surface and subsurface drainage is the same as an underflooding,[8] and assuming further that an underflow is the same as an overflow,[9] there would still be no liability here. For there is no liability when

[8] Respondent apparently suggests (Br. Opp. 2, 12, 14) that there has been an underground invasion by water pushing into the soil. The Government's activities have not caused any underground invasion since, as respondents recognize (Br. Opp. 2), the water table under the land is always higher than the water level of the river (Fdgs. 16, 20, R. 30, 32). The river could not force water above the level of the river itself. Hence river water is not forced into respondent's land; the water in the land simply does not drain away as fast as it formerly did. Thus, *Pixley* v. *Clark*, 35 N. Y. 520, cited by respondent (Br. Opp. 12-13) is irrelevant since there waters of a stream were forced through the banks into the subsoil of plaintiff's land.

[9] Our view is that a mere impairment of drainage without any invasion of the property itself does not constitute a taking of such property.

Ordinary high water mark has no relevancy where the damages complained of are changes in the flow of the river, not the flooding of land. For, unlike fast land, the flow of the

the overflow is caused by an improvement in navigation which does not raise the water level above the ordinary high-water mark, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, and consequently, on the Court of Claims' own premise, there can be no liability when the damage is caused by an overflow where the waters of the stream, as here, did not rise above the ordinary high-water mark. If the *Cress* case, as we think, involved a rise above high-water mark, it is inapplicable here; and if it did not, then, as we have already pointed out, *supra*, p. 16, it perished simultaneously with *United States* v. *Lynah*, 188 U. S. 445. On this

---

river is at all times subject to the servitude for navigation created by the Constitution in favor of the Federal Government. *United States* v. *Willow River Co.*, 324 U. S. 499; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Scranton* v. *Wheeler*, 179 U. S. 141, 163. Therefore, regardless of the extent in the alteration of such flow, whether extending above or below ordinary high water mark, there can be no liability predicated on such interference alone. Compensation is due only for whatever damages may be done property not subject to any servitude in the interest of navigation, such as fast land, or (*Hood* v. *United States*, 49 C. Cls. 669, 680) structure erected above high water.

Intangible riparian rights are subject to the same servitude in the interest of navigation of the stream as is the bed of the stream, and nothing is due for their impairment by the United States in the exercise of its paramount authority. Such intangible rights include the right of access to the waters (*Scranton* v. *Wheeler*, 179 U. S. 141; *Gibson* v. *United States*, 166 U. S. 269) and the right to subsurface drainage (*United States* v. *Meyer*, 113 F. 2d 387, 398 (C. C. A. 7)), certiorari denied, 311 U. S. 706; *Lynn* v. *United States*, 110

point the dissent below is simply unanswerable—and certainly it is not answered by anything in the Court of Claims' opinion.

The fallacy in the reasoning of the court below may be demonstrated by another approach. As this Court said in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424——.

> The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable". Exclusion of

---

F. 2d 586 (C. C. A. 5); *Christman* v. *United States*, 74 F. 2d 112 (C. C. A. 7).

The cases last cited represent applications of the fundamental distinction between consequential damage and a taking. A taking occurs when there is a permanent flooding of fast lands outside the bed of a river or permanent liability to intermittent but inevitably recurring overflow. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *United States* v. *Cress*, 243 U. S. 316; *Jacobs* v. *United States*, 290 U. S. 13, 16. But it has been recognized that these cases represent the "extremest qualification" of the rule that no recovery will be allowed for consequential damages. *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642; *United States* v. *Sponenbarger*, 308 U. S. 256, 265. Impairment of use of property without such permanent invasion does not constitute a taking. *Bedford* v. *United States*, 192 U. S. 217, 225; *Manigault* v. *Springs*, 199 U. S. 473, 483-484; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351; *Horstmann Co.* v. *United States*, 257 U. S. 138; *Sanguinetti* v. *United States*, 264 U. S. 146; *Gibson* v. *United States*, 166 U. S. 269.

Respondents refer (Br. Opp. 9-12) to *United States* v. *Williams*, 188 U. S. 485, a companion case to *United States* v. *Lynah*, 188 U. S. 445, and to *United States* v. *Causby*, 328 U. S. 256. The distinction between those situations and the

riparian owners from its benefits without compensation is entirely within the Government's discretion.

See also *United States* v. *Willow River Co.*, 324 U. S. 499, 507-508. The injury to respondent resulted from the fact that the Government's project held the level of the river at or near high water mark for longer periods than theretofore, thus depriving respondent of the advantage of drainage when the navigable river levels were at lower

---

present case was clearly stated in the *Lynah* decision. There, while holding that a taking had occurred because there was a flooding of the land, this Court approved the holding of *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.), that there was no taking when interference with drainage made it necessary to raise levees and to provide new drainage into back river. The *Causby* case likewise rested on the fact that there was an invasion of the claimants' property (328 U. S. at 265).

Consequently when, as here, there is no invasion, there is no taking. The error of the court below on the present point lies in its assumption (R. 38) to the contrary, viz., that recovery follows any impairment of usefulness of land caused by the Government, whether through invasion or otherwise. This view, of course, completely obliterates the settled distinction between taking and damage, and would in effect rewrite the Fifth Amendment. But, as this Court stated in *Sanguinetti* v. *United States*, 264 U. S. 146, 149, "in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."

If, therefore, the issue could be reached here, it would be clear that there is no basis in law for the assumption of the court below that underflow is the same as overflow.

stages. It was this advantage to which the court below referred as one of the "valuable incidents of the plaintiff's ownership" (R. 37). Thus, the theory is that respondent has a property right in the natural flow of the navigable stream. It is clear, certainly since the *Chicago M. St. P.*, *Appalachian Power* and *Willow River* decisions, to say nothing of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53 (which was not cited to the Court in the *Cress* case), that no such property right exists as against the United States.

(2) The only other basis for supposing that the *Cress* case compels recovery here is the circumstance that, there and here, the actual damage arose from raising the level of a non-navigable stream, Miller's Creek there and Dardenne's Creek here.

But that circumstance is not and in the nature of things cannot be controlling. Granted as it must be that riparian owner on the navigable stream cannot complain when the water raised to ordinary high-water mark causes a flooding of his land, it necessarily follows that the upstream owner on the non-navigable tributary cannot claim greater rights. In the *Cress* case, which allowed recovery, it was assumed by the Court that he could not. 243 U. S. at 319. Certainly nothing in that case attempts to give riparian owners on non-navigable tributaries greater rights in navigable streams than those enjoyed by riparian owners on the main navigable streams.

Now, the basis for the *Chicago, M., St. P. & P. R. Co.* rule is that the entire bed of the stream, i. e., up to ordinary high-water mark, is subject to a dominant servitude in the interests of navigation; and necessarily that servitude extends to non-navigable tributaries affected through the inexorable operation of natural phenomena. The proposition that water seeks its own level is quite as sound in law as it is in physics. Whether the rise of water of a navigable stream not above the high-water mark, therefore, affects the natural flow of that stream, or causes a flooding of riparian land, or affects the natural flow of a non-navigable tributary, or causes a flooding of riparian lands on the tributary, can make no difference. In each instance the damage caused results from the exercise of the dominant servitude of navigation, and, so long as the waters do not rise above ordinary high-water mark, there can be no liability on the part of the United States.[10] Certainly the right of the Federal Government to exercise its dominant servitude over the bed of the stream without payment of compensation cannot be affected by the location or character of the landowners who may be disadvantaged by such action. And

[10] Frequently, of course, there is no liability even when the water is raised above that level (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United States* v. *Willow River Co.*, 324 U. S. 499), but the extent of this additional zone of non-liability is never reached upon the present record.

since the riparian owner has no right to the maintenance of the level of the navigable stream below high-water mark, the owner of lands riparian to the non-navigable tributary of the navigable stream does not have greater rights. The contrary conclusion reached below thus has the curious result of conferring on a landowner riparian to a non-navigable tributary rights which are denied the landowner riparian to the navigable stream. The Court of Claims has given the landowner on Dardenne Creek rights in the maintenance of the Mississippi's level which landowners riparian to the Mississippi could not possibly possess. Thus, in the view of the Court of Claims, the farther away from the Mississippi that a man's lands are located, the greater his right to have the flow of that mighty stream continue to the sea unvexed by dams or other man-made structures.

Obviously, that is not the law. It follows, therefore, that the *Cress* case cannot support the judgment below, either on the view that an underflow is the same as an overflow, or on the view that the water level in a non-navigable tributary has been raised. The holding below, far from being compelled by the *Cress* case, as the court below seemed to think (R. 38), would extend that already twice limited decision to a new and quite illogical extent.

II. THE JUDGMENT IS IN ANY EVENT INVALID FOR LACK OF A FINDING AS TO WHAT PROPERTY INTEREST OF RESPONDENT'S WAS TAKEN BY THE UNITED STATES

As we have indicated, the opinion of the court below discussed the question (R. 37) "whether there has been a taking of the plaintiff's land within the meaning of the Constitution", reasoned that "one of the valuable incidents of the plaintiff's ownership, before the dam was built, was that the surface and underground water passed off his land leaving it available for profitable agriculture" (R. 37), and concluded (R. 39) that "the Government was not privileged, in the improvement of the navigability of the Mississippi, to 'take' without compensation the interest which we have discussed above in the plaintiff's land on Dardenne Creek."

But what, precisely, was the interest taken? It is clear from *United States* v. *Causby*, 328 U. S. 256, 267, that "an accurate description of the property taken is essential, since that interest vests in the United States," and that "the deficiency in findings cannot be rectified by statements in the opinion", citing *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205-206, and *United States* v. *Seminole Nation*, 299 U. S. 417, 422. The findings here do not describe either the nature of the supposed drainage right, nor the supposed easement of underflooding; as in the *Causby case*, there is no description of the nature or duration of the servitude or interest supposed to have been taken. Nor is there a finding that

any easement whatsoever had been taken. The only finding even purporting to describe what the United States is required to pay compensation for is Finding 29, as follows (R. 35):

> The privilege exercised by the Government, for which the plaintiff is given compensation in this suit, is the privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from present purposes.

Obviously, this is not a statement of a property interest at all. It is simply a conclusion to the effect that the United States had the "privilege" of carrying on governmental activity on a navigable river twenty-five miles downstream from respondent's land. But that "privilege" is really the right to engage in the improvement of navigation, a right which is conferred by the Constitution. Art. I, Sec. 8. This privilege or right or howsoever it may be characterized was not taken from respondent, and could not have been; nor would it have been bought from him by negotiation. For respondent had no such privilege or right. The United States has complete control over navigable streams and dams or other structures may be erected therein only by its permission. Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151

(33 U. S. C. 403); *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

Quite apart from any substantive deficiency, Finding 29 is technically inadequate. Certainly in the *Causby* case a finding to the effect that the United States had taken the privilege of maintaining the airport would not have been sufficient. It might just as reasonably be argued that when the United States takes land for use as an army camp it takes the "privilege" of maintaining such a camp. The fact of the matter is that whenever there is a taking in the constitutional sense it is a taking of specific property or of a specific interest in property, not the privilege of using the taken property for some particular governmental purpose. For the latter privilege never belonged to the original owner of the property.

Moreover, since there was no attempt to describe a property interest in respondent's land, there is no way of testing its sufficiency. As this Court said in the *Causby* case, 328 U. S. 256, 267, "It [the easement] is not described in terms of frequency of flight, permissible altitude, or type of airplane." So here, the property interest should be described in terms of permissible height of waters and duration thereof. And finally, the finding of the court below limits the Government's privilege to "permanently maintaining Lock and Dam No. 26." There is no warrant for so restrict-

ing the property interest said to have been taken. If the United States has taken and is compelled to pay for some right to maintain water in respondent's land at a certain height for certain periods, it should be able to use that property right in connection with any other dam it may build and not merely the present dam.

As we have said, these are technical inadequacies, and would require remand of this case for the making of appropriate findings sufficient to the support the judgment. We think, however, that the real vice of the findings cuts far deeper, and emphasizes what we have argued at length above, that there has been no taking of any interest in respondent's land, but simply the exercise of a governmental power on the part of the United States which has resulted in consequential injury to respondent's land, injury for which the Fifth Amendment does not require compensation to be paid. Actually, Finding 29, quoted above at p. 27, fully corroborates our view, and emphasizes our conclusion that there was no constitutional taking of respondent's land. Finding 29 undercuts the opinion below, underscores its unsoundness and lack of logic, and demonstrates with unusual distinctness why respondent is not entitled to recovery. The United States did not take anything that was his.

III. THE JUDGMENT BELOW CAN NOT BE SUPPORTED ON THE THEORY THAT CONGRESS HAS ASSUMED LIABILITY TO RESPONDENT.

In addition to claiming a right to compensation under the Fifth Amendment on the theory that there had been a taking of property, respondent contended that by the Act of August 26, 1937, 50 Stat. 844, 848, Congress had consented to recovery by respondent of $93,540.00 (Count II, R. 12). The Court below rejected this claim, holding that the Act did not constitute a waiver of the sovereign immunity from suit or a confession of liability for the consequences of building the dam (R. 37). Since respondent is free to rely on this contention to support the judgment below, insofar as he does not seek to enlarge his rights thereunder (*United States* v. *American Ry. Exp. Co.*, 265 U. S. 425), we reply to it here.

The court below was clearly correct in holding that the Act of August 26, 1937, *supra*, did not create any governmental liability. This Court has several times said that "A liability in any case is not to be imposed upon a government without clear words." *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196; *United States* v. *Zazove*, 334 U. S. 602, 617. And certainly the requisite clarity is lacking in the language of the 1937 Act. With respect to the project involving Lock and Dam No. 26, it provided (Fdg. 9, R. 26):

> Mississippi River between Missouri River and Minneapolis, Minnesota: The existing

project is hereby modified in accordance with the recommendation of the District Engineer in the report submitted in Rivers and Harbors Committee Document Numbered 34, Seventy-fifth Congress.

The report of the District Engineer concluded with the recommendation that authority be granted the Secretary of War to acquire low-lying lands and, as to respondent's land (referred to as Wiedmer Chemical Co. district) stated that the cost of acquiring 1,254 acres and the cost of tiling and ditching 366 acres in addition was estimated at $93,450.00 (Fdg. 8, R. 23-25). Thus, the 1937 Act merely authorized the Secretary of War to acquire the land if he thought it was advisable. It did not direct the Secretary to do so (cf. *United States* v. *Wilbur*, 283 U. S. 414), nor did it direct payment of any amount to respondent.

Moreover, the $93,540.00 represented simply the estimate of the District Engineer of the cost of acquiring 1,254 acres of ditching and tiling 366 acres (Fdg. 8, R. 24-26).[11] It did not purport to establish conclusively the value of the land and could not do so. Obviously it was contemplated that, if the authorization was executed, the amount should be determined in negotiations between the Secretary of War and the property owners.

In *Mitchell* v. *United States*, 267 U. S. 341, an Act of Congress at least as favorable to the claim-

[11] A preliminary report had concluded that there would be no damage to respondent's property (Fdg. 10, R. 26).

ant as the one on which respondent here relies was held not to support a suit in the Court of Claims. There, land was taken under authority of an act which appropriated $7,000,000 for—

> increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose.

This Court, denying a claim for indirect damages suffered as a result of the loss of a business, said through Mr. Justice Brandeis (267 U. S. at 345-346):

> By including in the appropriation clause the words "losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose," Congress doubtless authorized the Secretary of War to take into consideration losses due to the destruction of the business, where he purchased land upon agreement with the owners. But it does not follow that, in the absence of an agreement, the plaintiffs can compel payment for such losses. To recover, they must show some statutory right conferred. States have not infrequently directed the payment of compensation in similar situations. The constitutions of some require that compensation be made for consequential damages to private property resulting from public improvements. *Chicago* v. *Taylor*, 125 U. S. 161; *Richards* v.

Washington Terminal Co., 233 U. S. 546, 554. Others have, in authorizing specific public improvements, conferred the right to such compensation. *Ettor* v. *Tacoma*, 228 U. S. 148; *Joslin Manufacturing Co.* v. *Providence*, 262 U. S. 668. Congress had, of course, the power to make like provision here. Compare *United States* v. *Realty Co.*, 163 U. S. 427. But the mere reference in the appropriation clause to losses "resulting from the procurement of the land for this purpose", does not confer such a right. * * *

That decision is fatal to respondent's contention that his suit is "founded on a law of Congress."

Moreover, respondent's argument under the present heading (Br. Opp. 15-17) would do more than merely support the judgment below on a ground rejected below, it would enlarge the scope of that judgment; and of course respondent cannot do that where, as here, no cross-petition has been filed. *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435; *Langnes* v. *Green*, 282 U. S. 531, 538-539.

To begin with, acceptance of the present contention would impose upon the United States liability in the amount of $93,540.00, rather than the $22,519.60 provided by the judgment below. Next, the $93,540.00 amount represents the purchase price of 1,254 acres of land and the cost of filing and ditching 366 acres (Br. Opp. 16; R. 36). But the United States will not, by the judgment, obtain fee title to the 1,254 acres as it would be entitled

under respondent's theory. Finally, the District Engineer's suggestion was that a total of 1,620 acres of land be acquired or be ditched and tiled, while the judgment below awards compensation for the impairment in value of 1,107.96 acres (Fdgs. 24, 26, 27 R. 34-35). The argument now advanced does not, therefore, even relate to the same land as does the judgment, and hence does not and can not support the judgment below.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with directions to dismiss the petition.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

A. DEVITT VANECH,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROGER P. MARQUIS,
Attorney.

SEPTEMBER 1948.

INDEX

	Page
Statement	1
Summary of Argument	2
Argument:	
I. The owner of land on or adjacent to a non-navigable tributary of the Mississippi does not have the right, as against the United States, to have the Mississippi continue to fall to its natural low levels in order that the waters of the tributary might fall to the same low levels and permit drainage of the land	7
A. Treating as correct the assumption of the Court of Claims that the respondent owned a property right to drain Baldwin Farm, the loss suffered by respondent was *damnum absque injuria*	9
1. The right of the United States to improve navigation by holding the Mississippi at ordinary high-water mark must prevail	10
2. The parallel drawn in *United States v. Willow River Co.*, 324 U. S. 499, 510-511, between the riparian owner on a public waterway and the owner of land abutting a public highway, when extended to this case, demonstrates that the respondent's loss is *damnum absque injuria*	11
B. The navigation servitude is not an "easement" depending on land titles, but is a constitutionally delegated sovereign power	13
1. The "easement" theory is pure fiction	14
2. Adoption of respondent's conception of the "easement" theory would reduce the navigation servitude to insignificance	15
II. There is nothing in the record and findings in this case to establish that there is a property right as against anyone to drain the lands in suit	20
A. The court below erroneously assumed that respondent owned a property right to drain	20
B. If Baldwin Farm is non-riparian, respondent has no property right to drain	22

Argument—Continued

Page

C. The record does not show to what extent, if any, Baldwin Farm is riparian 25

Conclusion 28

CITATIONS

Cases:

Abbott v. *The K. C., St. J. & C. B. Ry. Co.*, 83 Mo. 271 5, 23

Anaheim Union Water Co. v. *Fuller*, 150 Cal. 327, 5, 7, 19, 25, 27

Applegate v. *Franklin*, 109 Mo. App. 293 5, 23

Blackwell v. *City of Lee's Summit*, 326 Mo. 491 12

Casanover v. *Villanova Realty Co.*, 209 S. W. 2d 556 5, 23

Crawford Co. v. *Hathaway*, 67 Neb. 325 6, 26

Collier v. *The C. & A. Ry. Co.*, 48 Mo. App. 398 6, 24

Frazier v. *Shantz Real Estate & Inv. Co.*, 343 Mo. 861, 5, 7, 19, 27

Gilman v. *Philadelphia*, 3 Wall. 713 4, 14

Gottenetroeter v. *Kapplemann*, 83 Mo. App. 290 5, 23

Goll v. *Railroad*, 271 Mo. 655 6, 24

Hickman v. *The City of Kansas*, 120 Mo. 110 3, 12

Illinois Central Railroad v. *Illinois*, 146 U. S. 387 26

Johnson v. *Leazenby*, 202 Mo. App. 232 5, 23

Kansas City v. *Brown*, 286 Mo. 1 3, 12

Lux v. *Haggin*, 69 Cal. 255 6, 26

McGinley v. *Platte Valley Public Power and Irrigation District*, 132 Neb. 292 6, 26

Mehonray v. *Foster*, 132 Mo. App. 229 6, 24

Sheehy v. *K. C. Cable Ry. Co.*, 94 Mo. 574 3, 12

The City of St. Louis v. *Gurno*, 12 Mo. 414 3, 12

Tremayne v. *City of St. Louis*, 320 Mo. 120 12

United States v. *Chandler-Dunbar Co.*, 229 U. S. 53 4, 14, 16

United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592 2, 10, 19

United States v. *Commodore Park*, 324 U. S. 386 2, 4, 10, 14

United States v. *Cress*, 243 U. S. 316 18

United States v. *Willow River Co.*, 324 U. S. 499, 2, 9, 10, 13, 19

Vollrath v. *Wabash R. Co.*, 65 F. Supp. 766 5, 23

Waterworks Co. v. *Jenkins*, 62 Mo. App. 74 6, 24

Wegmann v. *The City of Jefferson*, 61 Mo. 55 3, 12

Yearsley v. *Cater*, 149 Wash. 285 5, 7, 19, 25, 27

Constitutions and Statutes:

Constitution of United States, Fifth Amendment 11

Missouri Const. (1865), Art. I, sec. XVI 3, 11

Missouri Const. (1875), Art. II, sec. 21 3, 12

Act of May 18, 1796, c. 29, 1 Stat. 468 11

Act of March 3, 1803, c. 27, 2 Stat. 235 11

R. S. 2476, 43 U.S.C. 931 11

Miscellaneous:

	Page
2 Farnham, *Waters and Water Rights* (1904), p. 1572	25, 27
Gould, *Law of Waters* (3d ed. 1900):	
Sec. 148, p. 298	6, 26
Sec. 263, p. 536	23
Sec. 280, p. 556	6, 24
Note (1928) 55 A.L.R.:	
pp. 1386-1388	24
pp. 1390-1394	6, 24
Note (1937) 109 A.L.R.:	
p. 397	24
pp. 397-398	6, 24
Note (1908) 11 L.R.A. (N.S.), p. 1062	25, 27
3 Tiffany, *Real Property* (3d ed. 1939):	
Sec. 740, p. 155	23
Sec. 746, p. 173	24
Sec. 748, p. 180	24

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 1

THE UNITED STATES OF AMERICA, PETITIONER

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

STATEMENT

This case was argued orally to the Court on October 20, 1948. By order of June 13, 1949, the case was restored to the docket for reargument. The purpose of this brief is to supplement the discussion of two propositions:

First, assuming that an owner of land on or adjacent to a non-navigable tributary of the Mississippi River owns a property right to have his land drain into the tributary, he does not have the right, as against the United States, to have the Mississippi remain unimproved so that it will continue to fall to its natural low levels below ordinary high-water mark in order that the waters of

the non-navigable tributary might fall to the same low levels and thus permit drainage of the land.

Second, there is nothing in the record and findings in this case to establish that the respondent owned a property right, as against the United States or anyone else, to have its land drain into a non-navigable tributary of the Mississippi or anywhere else.

SUMMARY OF ARGUMENT

I

A. The court below apparently assumed the physical fact of drainage to be an "incident of ownership" and a property right attaching to the respondent's land. The assumed right of drainage and the Government's right, without liability, to hold the Mississippi River at ordinary high-water mark in aid of navigation cannot stand together. The Government's right must prevail. It is more than a mere property right. It is a constitutionally-delegated sovereign power. *United States* v. *Willow River Co.*, 324 U.S. 499, 510; *United States* v. *Commodore Park*, 324 U.S. 386, 390-391; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596-597. In exercising that right, the United States was doing no more than it had a right to do and the resulting loss to the respondent was *damnum absque injuria*.

The damages sustained by the respondent are not different from those suffered without indemnification by a Missouri landowner whose property is

reduced in value as a result of a change in the grade of a public street on which his land abuts. When the Missouri Constitution, like the Fifth Amendment, provided for compensation for property "taken," the owner of the lot abutting on the improved street could not recover. Missouri Constitution, 1865, Article 1, sec. XVI; *The City of St. Louis* v. *Gurno*, 12 Mo. 414, 419-420; *Wegmann* v. *The City of Jefferson*, 61 Mo. 55, 56. After the Missouri Constitution was amended to provide for compensation for property "taken *or damaged*" (emphasis supplied), the owner of the lot abutting the street where the grade was changed could recover (1875 Constitution, Article II, sec. 21); *Sheehy* v. *K. C. Cable Ry. Co.*, 94 Mo. 574, 578-579; *Hickman* v. *The City of Kansas*, 120 Mo. 110, 116-117; but, even then, the owner of the lot a block away from the altered street could not recover. *Kansas City* v. *Brown*, 286 Mo. 1, 21. Under the Fifth Amendment, the respondent is like the pre-1875 Missouri lot owner, and to the extent that its land is non-riparian it is in a position corresponding to that of the post-1875 Missouri lot owner, whose lot was a block away from the street whose grade was changed. Just as the Missouri political unit had a right, without liability, to change the grade of the street even though it resulted in loss to the lot owner, the United States has a right to hold the Mississippi at ordinary high-water mark.

B. There is no merit to the argument that the owner of land riparian to a navigable river buys subject to the Government's servitude as if it were an ordinary "easement" and, therefore, cannot complain when the Government improves the river for navigation, while the non-riparian owner or the owner riparian to a non-navigable tributary does not purchase subject to the "easement" (servitude) and, therefore, is entitled to recover. The "easement" theory is pure fiction. The Government's power to improve the river for navigation has nothing to do with the title to land or with rights reserved as in ordinary conveyancing. It is a sovereign power, derived from the constitutional authority to regulate commerce. *United States* v. *Commodore Park,* 324 U.S. 386, 393; *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 62-63; *Gilman* v. *Philadelphia,* 3 Wall. 713, 724.

If the respondent's concept of the "easement" theory were correct, the United States would be subject to liability on every non-navigable tributary of a navigable river whenever the Government undertook regulation of the river, whether it raised the river or lowered the river, so long as the landowner could prove damage. Furthermore, if the Government were liable to landowners on a non-navigable tributary because the land is not subject to the navigation servitude, it would seem that the same liability would extend to owners of non-riparian land since their title is not qualified by the navigation servitude. This would sharply re-

strict the Government's dominant power, since any riparian owner on the navigable river could put himself in the position of a non-riparian owner by conveying all but the front foot or two of his land contiguous to the river, and then procuring a reconveyance of that land to himself. *Frazier* v. *Shantz Real Estate & Inv. Co.*, 343 Mo. 861, 872; *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331; *Yearsley* v. *Cater*, 149 Wash. 285, 288-289.

II

A. The Court of Claims erroneously assumed that respondent owned a property right to drain, for the record and findings in this case do not establish that such a property right existed. If it did not exist, there was nothing for the Government to "take."

B. If Baldwin Farm was non-riparian, the respondent has no property right to drain. This is true both as to surface and subsurface waters. As to surface water, under Missouri law a landowner may use, occupy or improve his own land as he sees fit, despite the fact that, in so doing, the flow of surface water is changed and causes damage to adjoining land. *Abbott* v. *The K. C., St. J. & C. B. Ry. Co.*, 83 Mo. 271, 286; *Casanover* v. *Villanova Realty Co.*, 209 S.W. 2d 556, 558 (Mo. App.); see *Vollrath* v. *Wabash R. Co.*, 65 F. Supp. 766, 769 (W.D. Mo.); *Applegate* v. *Franklin*, 109 Mo. App. 293; *Johnson* v. *Leazenby*, 202 Mo. App. 232; *Got-*

tenetroeter v. *Kapplemann,* 83 Mo. App. 290; *Mehonray* v. *Foster,* 132 Mo. App. 229; *Goll* v. *Railroad,* 271 Mo. 655; *Collier* v. *The C. & A. Ry. Co.,* 48 Mo. App. 398. The same rule, it would seem, should control "percolating waters" which, it is assumed, the court below referred to as "subsurface waters." See, *Waterworks Co.* v. *Jenkins,* 62 Mo. App. 74, 80; Gould, *Law of Waters* (3d ed. 1900), sec. 280, p. 556; Note (1928) 55 A.L.R. 1390-1394; Note (1937) 109 A.L.R. 397-398.

C. To the extent that Baldwin Farm was riparian, the respondent may have a property right, as against other riparian owners, to drain. However, there is nothing in the record in this case to establish that Baldwin Farm or any part of it was riparian to Dardenne Creek. To be riparian, land must be in contact with the water. *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, 445; Gould, *Law of Waters* (3d ed. 1900), sec. 148, p. 298. The riparian rights extend to land back from the stream, but this extension is subject to two limitations. First, the entire riparian tract cannot embrace more acreage than that contained in the legal subdivision described in any one patent from the Government. *Lux* v. *Haggin,* 69 Cal. 255, 425; *Crawford Co.* v. *Hathaway,* 67 Neb. 325, 353-356; *McGinley* v. *Platte Valley Public Power and Irrigation District,* 132 Neb. 292, 297-298. Second, any land severed from the riparian tract by convey-

ance loses its riparian character. *Frazier* v. *Shantz Real Estate & Inv. Co.*, 343 Mo. 861, 872; *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331; *Yearsley* v. *Cater*, 149 Wash. 285, 288-289. Even if any of the land in suit is riparian, it seems doubtful that a riparian right would include the right to drain by artificial, rather than by natural means. The surface drainage on Baldwin Farm is by an artificial system of ditches and connecting pipes.

ARGUMENT

I

THE OWNER OF LAND ON OR ADJACENT TO A NON-NAVIGABLE TRIBUTARY OF THE MISSISSIPPI DOES NOT HAVE THE RIGHT, AS AGAINST THE UNITED STATES, TO HAVE THE MISSISSIPPI CONTINUE TO FALL TO ITS NATURAL LOW LEVELS IN ORDER THAT THE WATERS OF THE TRIBUTARY MIGHT FALL TO THE SAME LOW LEVELS AND PERMIT DRAINAGE OF THE LAND

In a state of nature before the Government's navigation dam was constructed, the Mississippi River fell to low levels (elevation 410 or below) for several months at the end of the year and about three months at the beginning of the year. This provided an opportunity for the water to drain naturally from the subsurface and to drain through an artificial drainage system from the surface of Baldwin Farm, the respondent's land (Fdg. 19, R. 31-32; Fdg. 15, R. 29; artificial drainage system shown on Def. Ex. 4 accompanying the record in this case (R. 45)). The drainage, both natural and artificial, was not into the Mississippi direct.

but into Dardenne Creek, a non-navigable tributary (Fdg. 14, R. 28).

After the Government's dam was constructed, the Mississippi was held to ordinary high-water mark (elevation 420.4), and Dardenne Creek was held to the same elevation in the vicinity of Baldwin Farm (Fdgs. 11, 12, R. 27). The Court of Claims found that, as a result, drainage of the water through the artificial surface drainage system has been obstructed and delayed, while the underground drainage of water has been almost entirely shut off (Fdg. 18, R. 31).

The majority of the court below were under the impression that this deprived the respondent of a property right for which it was entitled to compensation. This view is expressed in the opinion as follows (R. 37-38):

> One of the valuable incidents of the plaintiff's ownership, before the dam was built, was that the surface and underground water passed off his land leaving it available for profitable agriculture. That incident has now been impaired, in order to benefit navigation on the Mississippi. It is the kind of an incident of ownership that could have been granted by the plaintiff to the Government or a neighbor, the privilege of holding surface and underground water in the plaintiff's land, to its detriment as agricultural land. Such a grant would have created a burden in rem upon the plaintiff's land, which would have passed to subsequent owners and bound them.

From this language it is apparent that the court below assumed that the respondent owned a property right to drain Baldwin Farm.[1]

A. Treating as Correct the Assumption of the Court of Claims that the Respondent Owned a Property Right to Drain Baldwin Farm, the Loss Suffered by Respondent Was *Damnum Absque Injuria*

The court below made no finding that the respondent owned a property right to drain its land into Dardenne Creek. As shown by the portion of the opinion quoted above, it took that fact for granted. But even if we treat the fact of drainage as a property right, the conclusion reached below is wholly erroneous. At the outset, it should be pointed out that the conclusion of liability is the product of a unilateral treatment of the problem. The court below simply assumed the existence of a property right in respondent and found damage. It went no further. It did not examine into the rights of the United States. But "rights, property or otherwise, which are absolute against all the world are certainly rare." *United States* v. *Willow River Co.*, 324 U. S. 499, 510. Liability cannot properly be predicated on an examination of the rights of the claimant only, as if they were absolute. The rights of both parties must be examined in the light of their relationship to each other. When that is done, it becomes clear that

[1] This assumption is unwarranted. There is nothing in the record or findings to establish that respondent owned such a right (see *infra*, pp. 20-28).

e assumed right to drain into Dardenne Creek
d the Government's servitude for the improve-
nt of navigation cannot stand together. Either
e United States has the right to hold the Missis-
ppi River at ordinary high-water mark without
bility, or, as is implicit in the decision below,
e respondent on a non-navigable tributary, as
incident of ownership, has the right to have the
tural levels of the Mississippi left unaltered.

1. *The right of the United States to improve vigation by holding the Mississippi at ordinary gh-water mark must prevail.*—The right of the nited States to improve navigation by holding e Mississippi at ordinary high-water mark is ore than a mere property right. It is a sover-gn power vested in the Government as an inci-nt of the power to regulate commerce. *United ates* v. *Willow River Co.*, 324 U. S. 499, 510; *nited States* v. *Commodore Park*, 324 U. S. 386, 0-391; *United States* v. *Chicago, M., St. P & R. Co.*, 312 U. S. 592, 596-597. That constitu-nally granted power extends to the entire bed the river below ordinary high-water mark d, in that area, it is the paramount right. that area, private property rights are sub-dinate to the Government's paramount right and st yield when the sovereign sees fit to exercise *United States* v. *Chicago, M., St. P. & P. R. Co.*, 2 U. S. 592, 597. In this case, the United States ed within its paramount power. It remains the

Government's position, set forth in its opening brief (pp. 13-25), that, in stabilizing the Mississippi at ordinary high-water mark, the United States was doing no more than exercising its own servitude over the river to improve it for navigation. Any damage which resulted, whether to land riparian to the navigable river, or to land riparian to the non-navigable tributary, or to non-riparian land, was *damnum absque injuria.*

2. *The parallel drawn in* United States v. Willow River Co., *324 U. S. 499, 510-511, between the riparian owner on a public waterway and the owner of land abutting a public highway, when extended to this case, demonstrates that the respondent's loss is* damnum absque injuria.—The damages sustained by the respondent are not different from those suffered without indemnification by an owner whose property is reduced in value as a result of a change in the grade of a public street on which his property abuts.[2]

When the Missouri Constitution (1865 Constitution, Article 1, sec. XVI), like the Fifth Amendment, provided for just compensation for property "taken", the rule in Missouri was that the owner of a lot, fronting on a street where the grade was changed, could not recover for resulting

[2] As early as 1796, Congress declared "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; * * *." Act of May 18, 1796, c. 29, sec. 9, 1 Stat. 468, and Act of March 3, 1803, c. 27, sec. 17, 2 Stat. 235, R. S. sec. 2476, 43 U.S.C. 931.

damages to his property. *The City of St. Louis* v. *Gurno*, 12 Mo. 414, 419-420; *Wegmann* v. *The City of Jefferson*, 61 Mo. 55, 56. In 1875, the Missouri Constitution (1875 Constitution, Article II, sec. 21) was amended to allow compensation for property "taken *or damaged*" (emphasis supplied). Thereafter, the lot owner was held to be entitled to recover damages. *Sheehy* v. *K. C. Cable Ry. Co.*, 94 Mo. 574; 578-579; *Hickman* v. *The City of Kansas*, 120 Mo. 110, 116-117; see *Blackwell* v. *City of Lee's Summit*, 326 Mo. 491, 496; *Tremayne* v. *City of St. Louis*, 320 Mo. 120, 130-133. Even after the amendment, however, the owner of a lot a block away from the street where the grade was changed could not recover for impairment in value to his property resulting from the change in grade. *Kansas City* v. *Brown*, 286 Mo. 1, 21. Under the Fifth Amendment, the respondent is in no better position than the pre-1875 owner in Missouri whose lot abutted on the altered street. Even if the Fifth Amendment contained the phrase "or damaged," the respondent, so far as its land is non-riparian to Dardenne Creek (see *infra*, pp. 22-28), would be in the same position as the post-1875 Missouri lot owner, whose lot was a block away from the street whose grade was changed.

The rationale of the pre-1875 Missouri cases is that the municipality or other political unit had a right to change the grade of the street even though it resulted in loss to the abutting landowner. Similarly, the United States has a right to stabilize

the Mississippi at ordinary high-water mark. As in the Missouri cases, resulting loss to the landowner is *damnum absque injuria*. In this connection, it is significant that the Missouri courts did not confine their attention to the landowner who claimed damages, but gave heed also to the rights of the entity which improved the street. The majority of the court below, however, gave no consideration whatsoever to the right of the United States to raise the river to ordinary high-water mark. It merely focused its attention on the injury to Baldwin Farm, and from that drew its conclusion of liability (R. 37-38): "* * * but damage alone gives courts no power to require compensation where there is not an actual taking of property." *United States* v. *Willow River Co.*, 324 U .S. 499, 510.

B. The Navigation Servitude Is Not an "Easement" Depending on Land Titles, But Is a Constitutionally Delegated Sovereign Power

The suggestion has been made that the owner of land riparian to a navigable river buys subject to the Government's servitude, and, therefore, cannot complain when the Government improves the river for navigation, whereas the non-riparian owner, or the owner riparian to a non-navigable tributary, does not purchase subject to the servitude and, therefore, is entitled to recover. This theory is predicated on the false premise that the servitude is merely an "easement" which qualifies the title to no land other than that which is riparian

to the Mississippi either at the time the "easement" is exercised or at the time the land is purchased (Resp. Br., pp. 23-24).

1. *The "easement" theory is pure fiction.*—The navigation servitude was not created by express reservations set forth in patents or grants of the land drained by the Mississippi, as might be done in ordinary conveyancing. Nor was it created under a doctrine of case law which read into every such patent or grant an implied reservation of the navigation servitude. That servitude has nothing to do with the title to land nor with rights reserved as in ordinary conveyancing.[3] The source of the navigation servitude is the Constitution, not a reservation, express or implied, in grants and patents. It is derived from the "authority to regulate commerce." *United States* v. *Commodore Park*, 324 U. S. 386, 393. It has its origin in the historical power of the sovereign to control navigable waters, which formerly existed in the English Crown and in the States before the adoption of the Constitution. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62-63; (also see *supra*, p. 10). This understanding of the

[3] This Court has rejected the claim of a riparian owner who asserted rights in a navigable river predicated on ownership of the bed of that river. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. Parenthetically, it might be asked how respondent, none of whose land is riparian to the Mississippi, can have greater rights than the owner of the bed of the Mississippi.

origin of the Government's navigation servitude leaves no room for indulging in the fiction that it is a mere easement.[4]

2. *Adoption of respondent's conception of the "easement" theory would reduce the navigation servitude to insignificance.*—The respondent apparently regards the "easement" (navigation servitude) as qualifying the title of land which was riparian to the Mississippi at the time the private owner purchased it, regardless of whether it was riparian at the time the Government granted the land and reserved the "easement" (Resp. Br., pp. 23-24). This is erroneous since, even under the "easement" theory, the servitude would have been reserved to the Government at the time the patent or grant issued, and any subsequent purchaser of land in the watershed of the Mississippi would take subject to the Government's reserved servitude (see note 4, this page). Under respondent's concept of the "easement" theory, a riparian owner on a

[4] As a matter of fact, if the "easement" theory were correct, the navigation servitude would extend to all the land drained by the Mississippi River, including the land in suit. If a reservation of an "easement" (navigation servitude) in favor of the Government were to be implied, the implication would embrace all land which might be affected by exercise of the "easement," and that would mean all land in the watershed of the Mississippi. Since at one time the Government owned all that land, under the easement theory, every grant or patent impliedly reserved to the United States the "easement" (navigation servitude). Of course, conveyances by private parties subsequent to the patent or grant would not affect the prior "easement" reserved to the United States.

non-navigable tributary, or a non-riparian owner, would not be subject to the "easement" and, therefore, would own the right to have the natural levels of the navigable river left unaltered since title to his land would not be qualified by the "easement" to improve navigation. It is not made clear from what source the owner of land not on the navigable river would derive the right to have the navigable river left at its natural levels. Because Whiteacre is subject to an easement, it does not follow that the owner of Blackacre, adjoining, has a property right to have Whiteacre left free from exercise of the easement.

While the court below did not specifically rely on the fictional "easement" theory, at the same time, it did not state the basis for denying the United States the right to exercise its navigation servitude within the natural bed of the river. However, if, as respondent suggests (Resp. Br., pp. 23-24), the conclusion reached below can be justified on its interpretation of the "easement" theory, then what has been termed the "great and absolute" power to improve the river through exercise of the navigation servitude is reduced to insignificance. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62. On that basis, the Government's right to stabilize the Mississippi at ordinary high-water mark for the improvement of navigation may be exercised without liability only against owners of land which

is riparian to the navigable river at the time of the exercise of the servitude. The holding below, if sustained on the respondent's idea of the "easement" theory, would so sharply restrict the doctrine of a dominant public interest in navigation that, as a practical matter, the navigation servitude would be of little value, since the Government would have to pay for all damage to any property except that riparian to the navigable river.

First, the respondent's theory would subject the United States to liability on every non-navigable tributary of a navigable river every time the Government undertook regulation of the river. Of necessity, by virtue of inexorable principles of hydraulics, the Government, acting in aid of navigation, cannot lower or raise the Mississippi without affecting the levels of the lower stretches of its tributaries. No matter what the Government does by way of improving the navigable river, a landowner riparian to the non-navigable tributary would be obliged only to show damage to recover. Thus, if the Government lowered the level of the navigable river by diverting water, such a landowner could recover for impairment of agricultural value because his land drained faster or to lower levels than formerly. Again, he might recover for damage to his private fish hatchery, or because his land lost its value for duck hunting when the level of the non-navigable tributary was reduced so that

it no longer was possible to pump water from the stream into the fish tanks or onto the land in order to utilize it as a private duck reserve. On the other hand, if the Government raised the level of a navigable river to ordinary high-water mark, recovery could be had for impairment of drainage, for softening of levees, or for loss of head on a mill dam.[5]

Second, if, as the court below held, the Government is to be liable to riparian landowners on a non-navigable tributary, on the theory that their land is not subject to the navigation servitude, why is it not liable for damage to land non-riparian to the navigable river? After all, on respondent's theory, title to that land is not qualified by what the respondent has characterized as "the easement of dominant right of the Government" (Resp. Br., p. 23). Followed to its logical conclusion, this would reduce the Government's "dominant right" to little or nothing. If the fictional "easement" applies only to land riparian at the time the "easement" is exercised or at the time the land is purchased, any riparian owner on the navigable river could put himself in the position of a non-riparian owner. He could rid himself of the overriding navigation servitude by two conveyances—one transferring out all but the first foot or two of land immediately fronting on the river; the second, a

[5] On this point, see the discussion of *United States* v. *Cress*, 243 U. S. 316, in the main brief, pp. 16-17, 20.

conveyance retransferring the same land to himself. Upon completion of this conveyance circuit, the land back of the foot or two fronting on the river no longer would be riparian and, therefore, according to the "easement" theory, no longer would be subject to the navigation servitude. *Frazier* v. *Shantz Real Estate & Inv. Co.*, 343 Mo. 861, 872; *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331; *Yearsley* v. *Cater*, 149 Wash. 285, 288-289; see discussion *infra*, pp. 26-27.

It seems to the United States that, if the holding of the court below is correct, all substance is extracted from the doctrine of a paramount navigation servitude defined and sustained by this Court in *United States* v. *Willow River Co.*, 324 U. S. 499; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, and earlier cases. Landowners, riparian and non-riparian, within the watershed of the non-navigable tributaries of a navigable river, and non-riparian owners within the watershed of the navigable river will be entitled to damages if they can prove loss resulting from the lawful exercise of the dominant servitude in the interests of navigation. And riparian owners on the navigable river could bring themselves into the category of non-riparian owners by divesting their riverfront land of its riparian character through simple conveyances. The Government would be left with a shell of a right which, when exercised, would be

converted into an exercise of the entirely distinct power of eminent domain.

II

THERE IS NOTHING IN THE RECORD AND FINDINGS IN THIS CASE TO ESTABLISH THAT THERE IS A PROPERTY RIGHT AS AGAINST ANYONE TO DRAIN THE LANDS IN SUIT

In its opinion, the Court of Claims spoke of drainage of waters from Baldwin Farm as "an incident of ownership" belonging to respondent and stated that it was this incident which had been impaired by the improvement of navigation on the Mississippi (R. 37-38, quoted *supra*, p. 8). It follows that if the respondent did not own the property right to drain this land, then, even under the reasoning of the court below, there was nothing that the Government could have "taken." Up to this point in the brief, we have treated as correct the assumption of the court below that the respondent owned a property right to drain and have demonstrated that, even so, the respondent has no right as against the Government to have the Mississippi left undisturbed. However, that assumption was erroneous and without support in the record.

A. The Court Below Erroneously Assumed That Respondent Owned a Property Right to Drain

The opinion of the court below (R. 37-38, quoted *supra*, p. 8) assumes, without explanation, that the respondent owned an absolute right to have the

Mississippi River left unaltered, to continue to fall to its natural low levels in order that the waters of Dardenne Creek might fall to the same low levels and thus permit drainage from Baldwin Farm into the creek. The court made a finding concerning the existence of the physical fact of drainage. It found that the natural drainage of Baldwin Farm, for both surface and subsurface waters, was into Dardenne Creek (Fdg. 14, R. 28). But it did not find that the respondent owned a right to drain its land into Dardenne Creek or anywhere else. It simply took for granted that the respondent owned such a right.

Physical facts are not property rights. The sun shines on a garden. It does not follow that the owner has a property right to be free from having a building constructed on the adjoining lot which places the garden in the shade and makes it useless. Similarly, when the Mississippi was at its natural low levels, Baldwin Farm drained partly by natural means and partly by artificial means (Fdg. 19, R. 31-32; Fdg. 15, R. 29). It does not follow that the respondent has a property right to be free from having the Mississippi River stabilized at ordinary high-water mark in the improvement of navigation. The court below indulged in pure assumption when it treated the physical fact of drainage as an "incident of ownership," a property right, for the impairment of which the Government is liable because it changed existing physical conditions by

holding the Mississippi River at ordinary high-water mark.

In making the assumption that drainage was a property right, the Court of Claims did not indicate whether the assumed right was one which attached to all of Baldwin Farm, whether riparian or non-riparian, or, whether it was a property right which attached to riparian land only and that Baldwin Farm was riparian. The record is silent on the point and there is no finding concerning the riparian or non-riparian character of the land.[6]

B. If Baldwin Farm Is Non-Riparian, Respondent Has No Property Right to Drain

If the land in suit is not riparian to Dardenne Creek, the respondent has no property right in Missouri to have the water drain. This is true

---

[6] The entire Baldwin Farm, owned by the respondent, contains over 2,500 acres, of which 1,710 acres are in suit (Fdg. 2, R. 21; Fdg. 11, R. 27). Approximately 2,524 acres are described at R. 1-4. None of the land in sections 6, 8, 9 or 17 (1,640 acres) touches Dardenne Creek, and the original patents from the United States, conveying that land, did not include any land abutting the creek (Bureau of Land Management Tract Book, Missouri, St. Louis Series, East #1). Therefore, that land never was and never could be riparian. The remaining 884 acres are in sections 10, 15 and 16. Some of this land may be riparian. The land records of the Department of the Interior (Tract Book, Missouri, St. Louis Series, East #1) reflect that determination of how much is riparian would require an examination of the chain of title to ascertain (1) what part of the land was riparian under the original patents from the State of Missouri as to the school section 16, and that part of section 15 which was embraced in a swamp-land grant to the State; (2) what part was riparian under the original patent from the United States as to section 10 and a portion of section 15, and (3) whether any of the land riparian under the original patents lost its riparian character by virtue of subsequent conveyances.

both as to surface and subsurface waters. Missouri follows the common-law rule respecting "surface waters."[1] *Abbott* v. *The K. C., St. J. & C. B. Ry. Co.*, 83 Mo. 271, 286; *Casanover* v. *Villanova Realty Co.*, 209 S. W. 2d 556, 558 (Mo. App.); see *Vollrath* v. *Wabash R. Co.*, 65 F. Supp. 766, 769 (W.D. Mo.). This means that a landowner is at liberty to make any use whatever of his own property despite the fact that, in so doing, the flow of surface water is changed and causes damage to adjoining land by either increasing or diminishing the quantity of surface water previously on the land. For example, a landowner may drain "surface waters" from his land, though, in so doing, he, at the same time, drains the land of another and destroys its value as a fishery. *Applegate* v. *Franklin*, 109 Mo. App. 293. He may build a dam near the line dividing two farms, thus forcing the water back onto the property of the upper landowner, causing damage. *Johnson* v. *Leazenby*, 202 Mo. App. 232; *Gottenetroeter* v. *Kapplemann*, 83 Mo. App. 290. He may raise the grade of his land to prevent surface water coming upon it even if that results in diverting the water onto his neighbor's

---

[1] As used in the law of waters, the term "surface waters" means "Water spread upon the surface of land, or contained in depressions therein, if not flowing in a fixed channel, or not having permanent sources of supply, so as to constitute a watercourse, and not constituting a permanent lake or pond * * *. Waters of that character include such as come from rain and snows." 3 Tiffany, *Real Property* (3d ed. 1939), sec. 740, p. 155. It is also defined to include water "percolating the soil beneath the surface, if flowing in no definite channel * * *." Gould, *Law of Waters* (3d ed. 1900), sec. 263, p. 536.

higher land: *Mchonray* v. *Foster*, 132 Mo. App. 229. A railroad may substitute an earthen embankment for a trestle, or may construct a solid embankment in the first instance, thus causing adjoining land to be flooded by accumulated surface waters which formerly escaped through the trestle, or drained naturally. *Golt* v. *Railroad*, 271 Mo. 655; *Collier* v. *The C. & A. Ry. Co.*, 48 Mo. App. 398.

Subsurface waters, as dealt with in this case, would seem to be governed by the same principles as are applied to "surface waters." See, *Waterworks Co.* v. *Jenkins*, 62 Mo. App. 74, 80; Gould, *Law of Waters* (3d ed. 1900), sec. 280, p. 556.[8] Since Missouri follows the common law rule with respect to surface waters (cases cited at pp. 23-24, *supra*), it would seem that the same rule would be applied to percolating waters. Note (1928) 55 A.L.R. 1390-1394; Note (1937) 109 A.L.R. 397-398.

---

[8] Subterranean waters are of two classes: (1) underground streams and (2) percolating waters. The first class flows in known and defined channels. The second class, "percolating waters," are those which ooze, seep or percolate through the earth in unknown or undefined channels. 3 Tiffany, *Real Property* (3d ed. 1939), sec. 748, p. 180; sec. 746, p. 173. In this case, the court below did not find or otherwise indicate into which class it placed the subsurface waters on Baldwin Farm. However, from the tenor of the record it is presumed the subsurface waters were "percolating waters." This is in accord with the general proposition that, in the absence of evidence to the contrary, subterranean water is presumed to be percolating rather than in a defined underground stream. Note (1928) 55 A.L.R. 1386-1388; Note (1937) 109 A.L.R. 397.

Under Missouri law, the loss suffered by a landowner resulting from interference with surface and percolating waters by an adjoining landowner in the lawful exercise of his attributes of ownership is *damnum absque injuria*. The reason is that no property right has been infringed. The damaged landowner does not have a property right to have surface and subsurface waters drain upon adjacent land. Even if the water drained from non-riparian to riparian land and thence into the creek it would not enlarge the property rights in the non-riparian land. Nor does the fact that both non-riparian and riparian land are in one ownership create a property right to drain which attaches to the non-riparian land. Once land becomes non-riparian it can never regain its riparian character. *Anaheim Union Water Co.* v. *Fuller*, 150 Cal. 327, 331; *Yearsley* v. *Cate*, 149 Wash. 285, 288-289. Note (1908) 11 L.R.A. (N.S.) 1062; 2 Farnham, *Waters and Water Rights*, p. 1572 (1904). Accordingly, so far as Baldwin Farm is non-riparian, there is no validity to the assumption of the court below that drainage is a property right. It follows that respondent could not have been deprived of such a right as to its non-riparian lands.

C. The Record Does Not Show to What Extent, if Any, Baldwin Farm Is Riparian

If any part of Baldwin Farm is riparian to Dardenne Creek, then, as against other riparian

owners, to the extent that the land is riparian, the respondent may have a right to the flow of Dardenne Creek in its natural state. This, we assume, would include the right to have the stream free from an obstruction by another riparian owner which would raise the water and prevent drainage. However, from the record in this case, there is no way of knowing whether Baldwin Farm, or any part of it, is riparian. See *supra,* note 6, p. 22.

To be riparian "land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient." *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, 445; Gould, *Law of Waters* (3d ed. 1900), sec. 148, p. 298. It is true that the riparian rights do not attach merely to the frontage abutting the stream, but extend to land back from the stream. But, as between private riparian owners, who must share the waters of the stream, it does not extend back indefinitely. The area of land which may partake of the riparian benefit is controlled by two limitations. First, the entire riparian tract cannot embrace more acreage than that contained in the legal subdivision described in any one patent from the Government. *Lux* v. *Haggin,* 69 Cal. 255, 425; *Crawford Co.* v. *Hathaway,* 67 Neb. 325, 353-356; *McGinley* v. *Platte Valley Public Power and Irrigation District,* 132 Neb. 292, 297-298. Second, any land severed from the riparian tract by conveyance loses its riparian

character. Thus, if the owner of a riparian tract conveys the portion contiguous to the water, the remainder is cut off from all riparian rights. *Frazier* v. *Shantz Real Estate & Inv. Co.,* 343 Mo. 861, 872. Conversely, when a portion of a riparian tract not contiguous to the water is sold, it loses its riparian character and, as a corollary, subsequent additions to a riparian tract do not enlarge the acreage entitled to riparian rights. *Anaheim Union Water Co.* v. *Fuller,* 150 Cal. 327, 331; *Yearsley* v. *Cater,* 149 Wash. 285, 288-289. Note (1908) 11 L.R.A. (N.S.) 1062; 2 Farnham, *Waters and Water Rights,* p. 1572 (1904). As a matter of fact, land severed from a riparian tract can never regain the riparian right even though it be reconveyed so that the riparian and non-riparian land are in a single ownership. *Anaheim Union Water Co.* v. *Fuller, ubi supra.*

In the light of these principles, it becomes immediately apparent that a substantial portion of the land in suit is not riparian (see *supra,* note 6, p. 22) and, as to that land, even under the Court of Claims concept of a "property right" of drainage, the respondent did not own the right to drain into Dardenne Creek and, therefore, could not have been deprived of such a right.

Even as to any portion of the land in suit which might be found to be riparian, it seems doubtful that the riparian right would include the right to

drain by artificial rather than natural means. On the Baldwin Farm, surface drainage was by an artificial system of ditches and connecting pipes (Fdg. 15, R. 29; see Def. Ex. 4, accompanying the record in this case (R. 45)). The court below, however, made no distinction between natural and artificial drainage.

CONCLUSION

In this brief we have supplemented the discussion contained in our main brief, demonstrating that, even if the Court of Claims was correct in its assumption that the respondent had a property right to drain, the loss resulting from stabilizing the Mississippi River at ordinary high-water mark in the improvement of navigation was *damnum absque injuria,* since the United States was doing no more than it had a right to do. In addition, we have examined the validity of the assumption of a right to drain and have pointed out that if Baldwin Farm was non-riparian the respondent had no property right whatsoever to drain. To the extent that Baldwin Farm was riparian, the respondent may have had a right, as against fellow riparian owners, but not the United States, to have Dardenne Creek free of obstructions which would prevent drainage. However, the record in this case is silent on the issue of fact as to whether Baldwin Farm, or any part of it, is riparian.

For the reasons set forth in the Government's

briefs, the judgment below should be reversed, with instructions to dismiss the petition.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General;
A. DEVITT VANECH,
Assistant Attorney General;
MARVIN J. SONOSKY,
RALPH S. BOYD,
Attorneys.

DECEMBER, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE 1949 888098 844

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
APR 19 1948
CHARLES ELMORE CROPLEY
CLERK

No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, PETITIONER

V.

KANSAS CITY LIFE INSURANCE COMPANY, RESPONDENT

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

RAY B. LUCAS,
STANLEY BASSETT,
Attorneys for Kansas City Life Insurance Company, Respondent
3520 Broadway
Kansas City 2, Missouri

INDEX

Statement 1
Summary of Argument 4
Argument 4
Conclusion 17

TABLE OF CASES

Christman v. *United States*, 74 F. 2d 112 14
Healey v. *Citizens Gas & Electric Company*, 199 Iowa 82, 201 N. W. 118 13
Jacobs v. *United States*, 290 U. S. 13 13
Lynn v. *United States*, 110 F. 2d 586 14
Mills v. *United States*, 46 Fed. 738 ..... 8, 13
Pixley v. *Clark*, 35 N. Y. 520 12
Pumpelly v. *Green Bay Co.*, 13 Wall. (80 U. S.) 166 9
Scranton v. *Wheeler*, 179 U. S. 141 7
United States v. *Alexander*, 148 U. S. 186 17
United States v. *Causby*, 328 U. S. 256 ..... 11, 12
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592 ..... 6, 8
United States v. *Commodore Park*, 324 U. S. 386 6
United States v. *Cress*, 243 U. S. 316 ..... 7, 10, 13
United States v. *Dickinson*, 331 U. S. 745 ..... 9, 11
United States v. *Kaufman*, 96 U. S. 567 17
United States v. *Lynah*, 188 U. S. 445 10
United States v. *Meyer*, 113 F. 2d 387 14
United States v. *Welch*, 217 U. S. 333 13
United States v. *Williams*, 188 U. S. 485 9
United States v. *Willow River Power Co.*, 324 U. S. 499 4
Williams v. *United States*, 104 Fed. 50 10

STATUTE CITED

Act of August 26, 1937, Public No. 392, 75th Congress (50 Stat. 844, 848) 15

No. 621

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, PETITIONER

V.

KANSAS CITY LIFE INSURANCE COMPANY, RESPONDENT

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT

The impression which petitioner seeks to give is that slight and temporary damage was done to this real estate, and that in respect to drainage only. The findings show serious and permanent injury to the land due to raising the water level of the creek on which it was situated.

Before the erection and operation of the dam, drainage on this farm was through Dardenne Creek (Fdg. 14, R. 28; Fdg. 18, R. 31), a nonnavigable stream on which the property is located. This creek was then only two or three feet

deep (Fdg. 17, R. 30; Fdg. 18, R. 31). Vertical drainage, though slow, was effective (Fdg. 14, R. 28). The lowest land on respondent's farm was several feet above ordinary high water level at Dixon's Landing on the Mississippi which corresponded to the water level of Dardenne Creek (Fdg. 11, R. 31; Fdg. 17, R. 31).

The system of locks and dams (one of which, No. 26, is involved here) was put in operation for the purpose of providing a continuous nine foot channel for the Mississippi River (Fdg. 4, R. 22). This, of necessity, raised the level of the river which in turn raised Dardenne Creek six or seven feet (Fdg. 18, R. 31) above its previous level so that the creek water now backs into the outlet pipes in respondent's levee thereby obstructing and delaying drainage of surface water; and by maintaining the surface of the water at an elevation of 420 feet or more above sea level, the drainage of underground water from respondent's farm has been almost entirely shut off (Fdg. 18, R. 31).

The water in the sand below the soil on this farm and the ground water in the soil itself, rises and falls as the river rises and falls. When the river is low the ground water is low, when the river is high the ground water is high (Fdg. 16, R. 30). This of course is due to the water flowing back into Dardenne Creek and pushing into the soil and to water normally draining out of the soil not being able to get through. But the water table under the land is always higher than the water level of the river (Fdg. 16, R. 30; Fdg. 20, R. 32).

The Court found:

> Records of the river stages during those years [prior to 1938] reveal that there was almost always several months at the end of the year and about three months at the beginning of the year when the river

stage was at an elevation of 410 feet or below. Under those conditions, an opportunity was provided for draining the surface and subsurface water from plaintiff's farm sufficiently for the planting, cultivation and harvesting of crops. Since the dam has been in operation, the conditions and the period of time, formerly available for draining the land and drying the soil, no longer exist (Fdg. 19, R. 31, 32).

The effects of the dam were apparent soon after full pool stage was obtained. The surface of the soil dried out more slowly than before and drainage ditches were not so effective. The soil remained excessively wet. Planting of crops was delayed, farm machinery became mired and had to cease operation. Seed failed to germinate in many places. It was impossible to follow a proper crop rotation program (Fdg. 21, R. 32).

After the dam was placed in operation the ground water rose on 385 acres of this land (which had an elevation of about 424 feet mean sea level) to within three feet of its surface reducing its market value by more than one-half its former value (Fdg. 26, R. 34, 35). Such rise in water on 420 acres (at elevation between 424 and 425) reduced its market value about one-half as much as the reduction in value of the 385 acres of land (Fdg. 27, R. 35).

The findings of the court were that when a water table is held to within three feet of the surface, the soil remains cold and the seed rots or its germination is greatly delayed. If the underground water table is within three to five feet of the surface plants do not have a normal rooting because the air space is filled with water in the lower layers which converts nitrogen into ammonia which is detrimental to plant life (Fdg. 14, R. 28, 29). And this situation existed on the land found by the court below to have been diminished in market value (Fdgs. 26 and 27, R. 34, 35).

SUMMARY OF ARGUMENT

1. Fifth Amendment requires United States to pay compensation to owner of land on non-navigable creek flowing into navigable river where Government seriously injures said land by raising level of navigable river to and maintaining it at high water mark.

2. There is a taking where Government, by placing in operation Lock and Dam, causes percolation seepage and rise in ground water under soil of landowner and destroys drainage rendering land unfit for cultivation of crops.

3. Finding of Court of Claims as to what has been taken is sufficient.

4. Court of Claims was justified in rendering judgment for respondent on the basis of statute providing for payment for this land, whether or not there was a servitude by the Government or a taking.

ARGUMENT

1.

Petitioner relies on the case of *United States* v. *Willow River Power Company*, 324 U. S. 499, as holding no compensation should be paid.

The land in the instant case is located on a non-navigable creek which empties into the Mississippi River. The land is a mile and a half from the river (Fdg. 2, R. 21).

In the *Willow River* case the real estate was located directly on the St. Croix River, a navigable stream. The Court based its decision on the fact that the dam itself was "close to or upon the banks of the St. Croix." The Court also held that the claimant in that case had itself destroyed the natural flow of the non-navigable stream and

had created an artificial stream. "But the Government has not interfered with any natural flow of the Willow [the non-navigable stream in that case] past claimant's lands. Where it was riparian owner along Willow's natural channel claimant already had created an artificial level much above the Government level." The Willow River case bears out in every respect the claim of respondent in this case. A number of times it makes the distinction between property on a navigable stream and property on a non-navigable stream:

> The doctrine of riparian rights attained its maximum authority on non-navigable streams. No overriding public interest chilled the contest between owners to get the utmost in benefits from flowing streams. Physical conditions usually favored practical utilization of theoretical rights. In general non-navigable streams were small, shifted their courses easily and were not stable enough to serve as property lines as larger streams often do. They were shallow, could be forded and were no great obstacle to tillage or pasturage on two sides of the stream as a single operation. Such streams, like the lands, were fenced in, and while the waters might show resentment by carrying away a few spans of fence in the spring, the riparian owner's rights in such streams were acknowledged by the custom of the countryside as well as recognized by the law. In such surroundings and as between such owners equality of benefits from flowing waters was sought in the rule that each was entitled to their natural flow, subject only to a reasonable riparian use which must not substantially diminish their quantity or impair their quality. It was in such a stream that this Court found Cress as a landowner under the law of Kentucky possessed "the right to have the water flow away from the mill-dam unobstructed, except as in the course of nature. 243 U. S. 316, 330." l. c. 505.

After discussing the facts in the *Cress* case, the court proceeds:

> . . . The *Cress* case is significant in that it measured the rights of a riparian owner against the Government in improving navigation by the standard which had been evolved to measure the rights of riparian owners against each other. The rights of the Government at that location were held to be no greater than those of a riparian owner, and therefore, of course, not paramount to the rights of Cress. .1. c. 506.

But the Court concludes, "On navigable streams a different right intervenes." .1. c. 507.

United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, and *United States* v. *Commodore Park*, 324 U. S. 386, cited by petitioner, do not hold that the Government has the right to raise the water level to ordinary high water mark without liability to a property owner injured thereby where the property injured is not on a navigable stream.

In the *Chicago, M., St. P. & P. R. Co.* case the property for which the railroad asked compensation was situated in the river bed of a navigable stream, the property consisting of an embankment and some tracks that were themselves between the high and low water mark of the river.

In the *Commodore Park* case the land was situated on a navigable stream and the act complained of was causing "mud and silt to settle on that part of the land in question lying in the bed of what had been a navigable tide water creek," and destroying the navigability of the water on which the land was situated. That is to say, the land injured was actually in the river bed and the other injury asserted was denying accessibility to the navigable stream.

The court said specifically "all the waters affected were navigable." l. c. 392.

These decisions are in conformity with a number of cases which hold that the right of the Government to improve, change or build, in a navigable stream, is a dominant right to which the riparian owner's rights are subservient as far as the rights of the owner have to do with land between high and low water or with use of or access to the water of such stream. The doctrine that the Government has the right to raise the water level of a stream from low to high water mark, is based on the theory of these cases: that the Government's right in the flow of water in a navigable stream is a dominant right to which the owner's title is subservient.

All cases of that character involve rights of owners on navigable rivers and are based on the doctrine that one buying land on a navigable stream buys, as to the submerged land in front of his upland, "a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." *Scranton* v. *Wheeler*, 179 U. S. 141, l. c. 163.

A similar property rule exists in private real estate transactions not affected with the public interest where one buys land completely surrounding another man's real estate. Although no easement is of record the buyer takes the property subject to the inherent right of the owner of the enclosed land to a right of way out to the road.

United States v. *Cress*, 243 U. S. 316, on which the Court of Claims relied, involved land on a non-navigable stream and the court held as to such land the Government

was liable for the erection of a dam on a navigable stream which caused a non-navigable creek to rise, flow back, and injure the land of the owner on such non-navigable stream. On such point it has never been overruled or even criticized by the Supreme Court of the United States. The case, as any other case, must also be considered in the light of later cases construing it.

If the court itself did not make the distinction between navigable and non-navigable streams, later courts have done so. We have referred to this distinction made in the *Willow River Power Company* case (*supra*). In *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. l. c. 597, the court said in reference to the *Cress* case,

> . . . In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their land. . . .

Because the land in the *Chicago, M., St. P. & P. R. Co.* case was on the navigable stream the *Cress* case was held to be not applicable.

In *Mills* v. *United States*, 46 Fed. 738, l. c. 744, cited by petitioner, the court makes this same distinction:

> . . . It would seem to be otherwise if the stream were not navigable, but upon navigable waters, any franchise depending upon the use of the stream itself seems to be common to all, and to relate to the purposes of navigation and to facilities therefor. . . .

This rule has its basis in reason and common sense. A man buys a tract of land on the Mississippi River. He looks out at this great river, wide, turbulent, sweeping toward the gulf. He sees power, tremendous energy. In

fact, it is this power which he can translate into electricity which usually induces him to buy the land. He knows that over this river navigation moves and that the river has to be bridled to serve that navigation, knows that this great stream sometimes overflows its banks to wreak terrible destruction. He prefers because of the advantages to buy it and assume the risk of government action to aid and control navigation. None of these conditions exist where a man buys a farm back in the country on a little creek. Here he seeks no power or advantage of electrical plants or shipping docks. He simply settles down for the purpose of farming and the little stream that borders his farm is more or less a drainage ditch. There is nothing to lead him to believe that the great power of the Government will be exercised to control navigation. He seeks no advantage of the navigable stream, he assumes no risk going with the advantages of a navigable stream.

2.

Was there a taking? It has been said many times that the Fifth Amendment, "intended to preserve practical and substantial rights not to maintain theories," expresses a principle of fairness and not a technical rule of procedure. *United States* v. *Dickinson*, 331 U. S. 745.

As early as the case of *Pumpelly* v. *Green Bay Co.*; 13 Wall. 166, this court held that it was not necessary that some agent of the Government seize and hold the land in order to constitute a taking, that the Government could not by merely refraining "from the absolute conversion of real property" inflict on it irreparable and permanent injury without compensation because "in the narrowest sense of the word it is not *taken* for public use."

In *United States* v. *Williams*, 188 U. S. 485, this court held that a situation almost exactly the same as that in the

case at bar, constituted a taking. The facts are not set out in the decision of the Supreme Court. But from the Court of Appeals' decision, *Williams* v. *United States*, 104 Fed. 50, l. c. 53, the facts appear as follows:

> The facts found show that by reason of the obstructions so placed in the Savannah River and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation, and forced on the land; the superinduced addition of water actually invading it, destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and, in addition thereto, holding back and restraining in, over, and upon said plantation the freshets, the water from which was retained upon the same; by all of which the plantation has been rendered absolutely valueless. All of which is the result of the Government improvements and works, and without which its purposes could not be carried out and affected. This is a "taking" within the meaning of the fifth amendment (104 Fed. l. c. 53).

Seepage, percolation and destruction of drainage were also involved in *United States* v. *Lynah*, 188 U. S. 445, l. c. 469. These, with some overflow which together rendered the land an irreclaimable bog, were held to constitute a taking.

In *Cress* v. *United States*, 243 U. S. 316 (heretofore referred to on another point), a dam placed in the Kentucky River caused Miller's Creek, a non-navigable stream, to rise to such an extent that the owner's mill dam, situated thereon, could not be operated because the increased height of the water in the creek prevented the drop in the current necessary to run the mill. No part of the land or the mill was overflowed. The Court held this to be a taking. It said:

> . . . The right to have the water flow away from the mill dam unobstructed, except in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land . . . . 243 U. S. l. c. 330.

In discussing the question the Court (p. 325) referred with approval to the holding of the *Lynah* case that backing water up against the landowners' embankment and interfering with drainage of their plantation was a taking.

The *Williams*, the *Lynah*, the *Cress* cases together establish without question that seepage, percolation and prevention of drainage caused by a dam erected by the Government, constitutes a taking if the land is seriously depreciated in value thereby.

Have any of these decisions been overruled? The *Williams* case has not been referred to again by this court. The *Lynah* case has been questioned, debated, construed and interpreted but it still remains the law on the question of taking. It was overruled in the *Chicago, M., St. P. & P. R. Co.*, case as to that part of the opinion holding the Government liable for injury to land in the bed of a navigable stream for raising its level to high water mark. But that case recognized as correct its decision on the question of taking (312 U. S. 592, l. c. 598). In *United States* v. *Dickinson*, 331 U. S. 745, l. c. 748, it was cited on the question of jurisdiction and in *United States* v. *Causby*, 328 U. S. 256, l. c. 261, note 6, it was cited with approval on the question of taking.

The *Cress* case has also been discussed in many decisions but never questioned on the principle of what constitutes taking and was quoted in *United States* v. *Causby*, 328 U. S. 256, l. c. 266, on its doctrine "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial that determines the question whether it is a taking."

A recent case which we think squarely in point is the *Causby* case, 328 U. S. 256, just referred to. In that case, taking was asserted because airplanes were flown over chicken farm at a height of 83 feet (which was 63 feet above the barn and 67 feet above the house) causing chickens to be frightened and killed and rendering the farm useless as a chicken farm. The land was not touched, the title was retained by the owner. The Government contended there was no taking and that the injury was consequential. The Court held that if by reason of such flights the owners could not use the land for any purpose the loss would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it. The court said that the fact that the planes never touched the surface "would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate" l. c. 262. The court further said that some value would remain, but that use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value.

This is precisely the situation in the instant case except that the injury was done by water 3 to 5 feet under the ground. But if the Government's action 83 feet above the ground is a taking certainly its action 3 to 5 feet under the ground is likewise so. It is conceded that a flooding on top of the ground would be a taking. What possible difference would it make whether the flooding were an overflow or an underflow if it destroyed totally or in part the utility of the land?

Discussing this very question many years ago in a case where underground water had caused damage, the New York Court of Appeals stated the doctrine very clearly:

> . . . To hold that defendants would be liable, if their interference with the surface stream had damaged

> the plaintiff, by overflowing the natural banks and pressing it through the artificial embankment, but not, if they pressed it through the natural banks, would be about as sound legal justice, to my mind, as if we should have a man liable for stabbing another in the bosom, but, if he stabbed him under the arm, though the knife should come to the same point in the body, there should be no liability. . . . *Pixley* v. *Clark*, 35 N. Y. 520, l. c. 530.

The Iowa courts, in a carefully considered case, *Healey* v. *Citizens' Gas & Electric Company*, 201 N. W. 118, l. c. 121, 199 Iowa 82, l. c. 90, have held likewise:

> The *Pixley* case, and some of the other cases, hold that there is no difference in flooding one's land, whether it is by overflowing, or underflowing (percolation). The water reaches the land and injures or destroys its use in either event. . . .

The Government stresses the fact that the owner is still in possession of the land. But as stated in the Causby and other cases that does not change the landowner's right to recover to the extent that the land is taken. Partial taking is recognized in all the cases: *Jacobs* v. *United States*, 290 U. S. 13, l. c. 16; *United States* v. *Cress*, 243 U. S. 316, l. c. 327-329; as is the liability for taking of an easement: *United States* v. *Welch*, 217 U. S. 333, l. c. 339.

Petitioner has cited one United States District Court case and three United States Circuit Court of Appeals cases on the question of taking and consequential damages.

The District Court case, *Mills* v. *United States*, 46 Fed. 738, was a case where the land was on the navigable tidewater Savannah River and plaintiff asserted the right to continued use of the ebb and flow for their drainage and flooding for rice cultivation. The case was decided on

the basis that "all the right they have in the ebb and flow of the tide of the Savannah River is subordinate to the control of the government over that navigable stream, for its free navigation by the public." l. c. 747.

Lynn v. *United States*, 110 F. 2d 586, likewise was a case where the land was on a navigable stream and the decision was based on the dominant right of the Government on such streams and not on the question whether injuring the drainage was a taking. In that case also the Goverment had paid for the land and covered by that payment, the damage claimed.

Christman v. *United States*, 74 F. 2d 112, was a case where flash floods rushing down a comparatively steep descent swept over the land doing serious damage and the court held that the flood, not the dam, caused the injury. All of these are distinguishable from the instant case.

United States v. *Meyer*, 113 F. 2d 387, used the language quoted in petitioner's brief. The facts were not stated, the cases cited were not subsurface drainage cases. The case therefore is of little value and is in conflict with the Supreme Court cases heretofore cited.

In the instant case the Government has placed a dam in the Mississippi River with the result that water is kept in the ground of respondent (from Dardenne Creek which borders the land) so near the surface as to destroy the value of the land to the extent of over one-half its value on one tract and more than one-fourth its value on another. And this condition will be permanent as it is due to a general policy of the Government to maintain a continuous nine foot channel. The water is held there day after day, night after night except in times of flood. The water continues to push into the soil, it cannot drain out.

How there could be a more complete invasion is hard to imagine.

3.

Petitioner asserts that the description of the property is not sufficiently accurate. The finding was not attacked below, no motion for a new trial was filed. This point is based on the *Causby* case where the Court said, "The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent."

The Court's finding on this question is set out on page 13 of Petition for a Writ of Certiorari and in Finding 29 (R. 35). It is clear, concise and full. The Government is amply protected thereby. If the property were conveyed it would be made subject to this right of the Government and the language of the finding would be set out. To permanently maintain Lock and Dam No. 26 at their present height and operate them in such a manner as to fulfill the purposes of their construction and other purposes which may develop in the future and do not greatly vary from the present purpose is all the Government has ever sought and no buyer of property could be deceived by this language.

4.

There is the further reason why the judgment of the Court of Claims should be affirmed: Congress has by specific Act authorized payment for the injury done. (Act of August 26, 1937, Public No. 392, 75th Congress 50 Stat. 844, 848) The Court of Claims took the view that this

Act of Congress did not constitute a waiver of immunity from suit.

The record shows that for many years Congress has been seeking information as to the effect of the erection of the system of dams of which Dam No. 26 is one. On the basis of a report made in 1935 the Committee on Rivers and Harbors of the House of Representatives passed a resolution asking the Board of Engineers for Rivers and Harbors to make further investigation with a view to finding the exact damage to these properties by seepage, backwater and increased cost of drainage (Fdg. 7, R. 23).

After a thorough investigation this Board made, in 1936, a complete report including the recommendation of the District Engineer showing very extensive damage to these properties including that involved here, predicting exactly what occurred in this case (Fdg. 8, R. 23-26). As to this particular property the district engineer had found that the costs of remedial work would be more than the value of the land and recommended that 1,254 acres be bought and that as to 366 acres the owner be paid the cost of tiling and ditching, or a total payment of $93,540. The court in this case has found injury to 1107.96 acres and has fixed the depreciation of value at $22,519.60.

The District Engineer, in the report referred to, recommended that authority be granted the Secretary of War to acquire these low lying lands and that the money above referred to be made available therefor immediately (Fdg. 8, Recommendation 119, R. 24, 25).

Upon receipt of this report Congress in 1937 modified the project which had already been approved "in accordance with these recommendations of the District Engineer" (Fdg. 9, R. 26). Congress has thus specifically authorized payment for the precise injury which occurred to this land.

It is established law that even though the Government is not liable for an injury not constituting a taking, a moral obligation, for a tort, or for consequential damages, Congress can create liability therefor. In *United States* v. *Alexander*, 148 U. S. 186, l. c. 188, the Court said:

> We do not find it necessary to consider on which side of the line thus suggested the present case would fall, for we agree with the Court below in thinking that, in the Act of Congress, under which this public work was done, are found provisions giving an express remedy for property damaged though not actually taken. . . .

There are many cases to this effect.

Congress having provided for recovery, the Court of Claims has jurisdiction. *United States* v. *Kaufman*, 96 U. S. 567, l. c. 569-70.

CONCLUSION

Petitioner asserts that an authoritative determination of the questions involved here is necessary in order that the law may be clarified and as a guide to the Government.

It is submitted that the question has already been determined authoritatively by this Court in many decisions. The *Williams*, the *Lynah*, the *Cress*, the *Scranton* cases in the past, the *Chicago, M., St. P. & P. R. Co.*, the *Willow River Power Company*, the *Causby*, the *Dickinson* cases of recent date have determined the law with great clarity and have made it plain when the Government is liable and when it is not. It is respectfully submitted that this case was properly decided and no purpose will be served by further discussion of principles now firmly established.

RAY B. LUCAS,
STANLEY BASSETT,
Attorneys for Kansas City Life Insurance Company, Respondent

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 7 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 49

THE UNITED STATES OF AMERICA, *Petitioner*

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE KANSAS CITY LIFE INSURANCE COMPANY

RAY B. LUCAS,
STANLEY BASSETT,
3520 Broadway,
Kansas City 2, Missouri,
Attorneys for Respondent, Kansas City Life Insurance Company.

INDEX

Statement 1
Summary of Argument 6

Argument—

I. There was a taking for which the Fifth Amendment requires compensation 10

A. The United States by the erection and operation of Lock and Dam No. 26, caused pushing up of water into the soil, percolation, seepage, and destruction of drainage 10

B. The United States must pay compensation since it raised the waters of a nonnavigable stream to high water mark, destroying the land for agricultural purposes 21

C. There was liability since injury was to fast land 29

II. Finding of the Court of Claims is adequate as to what property interest was taken 29

III. The Court of Claims was authorized to render judgment for respondent on the basis of Act of Congress, whether or not there was a servitude of the Government or a taking 32

IV. The United States is liable under the Tucker Act because there was a contract to pay implied in fact 36

Conclusion 36
Appendix (Exhibit 29) 39

CITATIONS

Cases—

Beals v. *Robertson*, 52 Atl. 2d 316, 356 Pa. 348 19
Bedford v. *United States*, 192 U. S. 217 23
Brown v. *Wilson*, 348 Mo. 658, 155 S. W. 2d 176 21
Christman v. *United States*, 74 F. 2d 112 ..... 17, 21
Costello v. *Bowen*, 182 Pac. 2d 615, [redacted] 19
Cubbins v. *Mississippi River Commission*, 241 U. S. 351 23
De Ruwe v. *Morrison*, 184 Pac. 2d 273 19

Dismuke v. *United States*, 297 U. S. 167 33
Gibson v. *United States*, 166 U. S. 269 22
Greenleaf Johnson Lumber Co. v. *Garrison*, 237 U. S. 251 22
Greisinger v. *Klinhardt*, 321 Mo. 186, 9 S.W.2d 978 19
Hadley v. *Baxendale*, 9 Websby, Hurlstone & Gordon's Reports (Exchequer) 341 20
Hartvedt v. *Harpst*, 173 S. W. 2d 65 21
Healey v. *Citizens Gas & Electric Company*, 199 Iowa 82, 201 N. W. 118 14
Hood v. *United States*, 49 C. Cls. 669 25
Horstmann v. *United States*, 257 U. S. 138 20
Hughes v. *United States*, 230 U. S. 24 23
Jackson v. *United States*, 230 U. S. 1 23
Jacobs v. *United States*, 290 U. S. 13 16
Kansas City Life Insurance Company v. *United States*, 109 C. Cls. 555 30
Keener v. *Sharp*, 341 Mo. 1192, 111 S. W. 2d 118 19
Kelley's Creek & N. W. R. Co. v. *United States*, 100 C. Cls. 396 25
King v. *United States*, 59 Fed. 9 17
Larson v. *Remelius*, 76 N. E. 2d 922 19
Lewis Blue Point Oyster Culture Co. v. *Briggs*, 229 U. S. 82 22
Logsdon v. *Anderson*, 30 N. W. 2d 787 19
Lynn v. *United States*, 110 F. 2d 586 17
Mills v. *United States*, 46 Fed. 738 18
Mitchell v. *United States*, 267 U. S. 341 34
Olson v. *Roscoe*, 30 N. W. 2d 664, p. 149 19
Peabody v. *United States*, 231 U. S. 530 16
Pixley v. *Clark*, 35 N. Y. 520 14
Portsmouth Harbor Land & Hotel Company v. *United States*, 250 U. S. 1 16
Portsmouth Harbor Land & Hotel Company v. *United States*, 260 U. S. 327 16
Reese v. *State*, 72 N. Y. S. 2d 209 19
Sanguinetti v. *United States*, 264 U. S. 146 20
Schmahl v. *Ackerson*, 74 N. E. 2d 614 19
Scranton v. *Wheeler*, 179 U. S. 141 ..... 7, 22, 29
Turner v. *Hopper*, 188 Pac. 2d 257 19
United States v. *Appalachian Electric Power Co.*, 311 U. S. 377 ..... 22, 23
United States v. *Causby*, 328 U. S. 256 ..... 13, 14, 15, 21

United States v. *Chandler Dunbar Water Power Company*, 229 U. S. 53 23
United States v. *Chicago, B. & Q. R. Co.*, 82 F. 2d 131 17
United States v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161 17
United States v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592 ..... 8, 22, 25
United States v. *Commodore Park*, 324 U. S. 386 22
United States v. *Cress*, 243 U. S. 316 ..... 7, 8, 12, 16, 27, 35
United States v. *Dickinson*, 331 U. S. 745 ..... 7, 13, 36
United States v. *Lynah*, 188 U. S. 445 ..... 7, 12
United States v. *Meyer*, 113 F. 2d 387 17
United States v. *Sponenbarger*, 308 U. S. 256 23
United States v. *Wabasha-Nelson Bridge Company*, 83 F. 2d 852 17
United States v. *Welch*, 217 U. S. 333 16
United States ex rel. v. *Wilbur*, 283 U. S. 414 34
United States v. *Willow River Power Company*, 324 U. S. 499 ..... 8, 18, 23, 26, 29
United States v. *Williams*, 188 U. S. 485 ..... 7, 12
Williams v. *United States*, 104 Fed. 50 12
Willink v. *United States*, 240 U. S. 572 22

Constitution—

Fifth Amendment 6, 10, 36

Statutes—

Act of August 26, 1937, 50 Stat. 844, 848 ..... 4, 9, 33, 34
Federal Tort Claim Act (Act of Aug. 2, 1946, c. 753, Title IV, 60 Stat. 842. Act of Aug. 1, 1947, c. 446, 61 Stat. 722) 37
Tucker Act (Mar. 3. 1887, c. 359, No. 1, 24 Stat. 505; Mar. 3, 1911, c. 231, No. 145, 36 Stat. 1136) 10, 36
English Crown Proceeding Act, 1947, 10 and 11 Geo. 6, c. 44 37

Miscellaneous—

House Document No. 137, 72nd Congress, 1st Session 3
Rivers and Harbors Committee Document No. 34, 73rd Congress, 2d Session 37
Rivers and Harbors Committee Document No. 34, 75th Congress 5, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 26

THE UNITED STATES OF AMERICA, *Petitioner*

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE KANSAS CITY LIFE INSURANCE COMPANY

STATEMENT

There are some things about the petitioner's summary of findings of the Court of Claims which we think need clarification and we therefore make this additional statement of facts:

Petitioner's statement that the water table in respondent's land is now and always has been higher than the river stage is a correct statement of the findings of the Court of Claims; but the conclusion "hence water from the river has not been forced under respondent's land" is not a finding of the Court of Claims. In fact, the Court of Claims found to the contrary, ". . . The water in the sand is affected

by the rise and fall of the Mississippi River and the *water table under the land* rises and falls in response to high or low water conditions in the river. . . . It was found that when the river was low, the water table under the land was also low and when the river rose, the height of the water table increased, but the water table was always higher than the river except during the dry summer months when vegetation was extracting the water. . . ." (Fdg. 16, R. 30). (The italics are ours and this phrase is emphasized because petitioner in its statement of facts merely refers to the fact that the water in the sand is affected by the rise and fall of the Mississippi river.)

To illustrate what occurred we have attached as an Appendix, copy of Exhibit 29, one of the exhibits in this case although not brought up with the record. It is based on official Government records of the elevation of the river beginning with 1915 and running through 1945, at Dixon's Landing which the evidence showed had the same elevation as Dardenne Creek. The area shown in yellow indicates the times during the years 1915 to August, 1938, when the river was below 418.9 feet, the approximate level which is now kept at the dam. During much of the period before the dam was placed in operation the water was lower than 415 feet and often lower than 410 (it will be recalled that the lowest land was 422.7). The period from August 8, 1938 (when the dam was put in operation) through 1945 shows the water kept at 418.9 feet as it necessarily would be by the dam being kept in operation. The few times the water table is shown below this level is when the dam was out of operation for a short time. It will be observed from this exhibit that during practically the entire period before the dam was in operation, in the planting season in the spring and the harvesting season in the fall, the water was sufficiently low to allow plant-

ing and harvesting of the crops which, of course, is impossible now with the dam in operation. This is the basis of the finding of the Court as follows:

> . . .. Records of the river stages during those years reveal that there was almost always several months at the end of the year and about three months at the beginning of the year when the river stage was at an elevation of 410 feet or below. Under those conditions, an opportunity was provided for draining the surface and subsurface water from plaintiff's farm sufficiently for the planting, cultivation and harvesting of crops. Since the dam has been in operation, the conditions and the period of time, formerly available for draining the land and drying the soil, no longer exist (Fdg. 19, R. 32).

None of the land involved in this suit was below the high water mark of the Mississippi River. Of the land for which compensation was allowed the lowest was 423.5 feet (Fdg. 24, last Par., R. 34) and the highest was 425 feet (Fdgs. 26 and 27, R. 34, 35) which would mean that all of the land for which compensation was allowed is three to almost five feet above high water level and therefore is fast land. The finding of the Court was that the *ground water* in this land after the dam was placed in operation often reached a height of 422.5 feet (Fdg. 12, R. 27), which was two feet above high water level. As to the portion of the land for which the largest compensation was allowed, the Court held that the underground water table had been raised to within three feet of the surface of this land (Fdg. 26, R. 34, 35) which would be around one foot above the high water mark.[1]

---

[1]The engineer's report in House Document No. 137, 72nd Congress, 1st Session, filed in 1931 and referred to in documents in evidence, states as to Dam No. 26 "The pool elevation proposed is 419 feet; this is about one foot above ordinary high water at

Counsel for Government refers to the fact that a portion of the land is valuable only as hunting preserve and its value has not been diminished by operation of the dam (Fdg. 24, R. 34). This is the land for which no compensation was allowed and is therefore not involved in this controversy.

Government's Counsel also refer to finding as to 302.96 acres of land in the sum of $1,694.60. This finding was also as to some of the lowest land on the farm and the Court merely exercised its judgment as to all of the testimony, in finding the amount of depreciation. This Court, and the Court of Claims, have always held that finders of fact have wide discretion in determining items of damage. The Court said the proof did not show the *exact* amount of the depreciation of this 300 acre tract. It did not say there was no proof of damage. Its finding of $1,694.60 is conclusive that there was evidence on which to base it.

On the question of the effect of the Act of Congress authorizing this project in accordance with the recommendations of the District Engineer there are several facts which are not clear from the statement of facts by the Government.

Since 1932, and perhaps earlier, the Congress had been attempting to get a full report as to what injury would be done to the land by the erection of the dam at Alton, and other places. The Committee on Rivers and Harbors of the House of Representatives at least twice sent a resolution to Government Engineers requesting that informa-

---

the site" (page 120). This would mean that ordinary high water mark was 418 at Grafton, Illinois, the site of the dam, before the dam was erected, and the water was raised one foot above high water mark.

tion. These resolutions of the Committee on Rivers and Harbors clearly indicate that Congress was concerned about damage being done to these lands and recovery being prevented by some technical defense as to the nature of the taking. The resolution (prior to Document No. 34, 75th Congress, which Congress approved) requested the engineers to make a thorough examination "with a view to ascertaining as nearly as can be estimated the exact damage that may be caused to each of the levee and drainage districts bordering this river by seepage, back-water, and the *increased cost of drainage* that will be caused by the prosecution of the existing project, and the probable capitalized cost of reimbursing each of said districts for such damage". (Fdg. 7, R. 23) (The italics under the phrase in reference to drainage are ours as the Government in its statement of facts did not refer to this item).

On the basis of this resolution Army Engineers made a thorough investigation and filed with Congress what is known as Rivers and Harbors Committee Document No. 34, 75th Congress, dated June 1, 1936, which discussed the entire project on the upper Mississippi, including the particular property involved in this litigation. (Fdg. 8, R. 23) The document was of considerable length and shows very careful study of the question of drainage, seepage, back-water, and predicted exactly what happened in this case when the dam was erected. Among other things, the report, in referring to this property, said, ". . . Gravity drainage from the low-lying lands will be cut off when pool 26 is established. There are 1,254 acres of land which may be eliminated as agricultural land if funds are not expended for remedial works and 366 acres in addition which may be effectively drained by a combination of tiling and ditches" (Fdg. 8, R. 24). The engineers then went on to say that the cost of remedial works would exceed the cost of the land as to 1,254 acres and that there were 366

acres which might be saved by expensive drainage and the engineers recommended that money be paid this landowner for these items which the engineers estimated amounted to $93,540.

The recommendation of the District Engineer referred to six districts in addition to this one, and his recommendation that $624,645 be made available therefor immediately covered this item of $93,540 plus the cost of acquiring the six other properties which were in the same situation. Counsel for the Government seems to think there is some uncertainty as to what the District Engineer had in mind but that is plain from the record. He estimated that ditching and tiling the entire 1,620 acres (the two tracts of 1,254 and 366 acres respectively) would cost $81,000 (Fdg. 8, R. 24); that would be $50 an acre. He then figured that the installation of a pumping plant necessary if the 1,254 acres were to be kept in condition for agricultural use, would be very expensive—$2,339 a year. So he concluded that it would be better to pay to the landowner the $50 an acre on the 366 acres which would be $18,300, and buy the land outright. His basis for paying for the land can be determined by deducting $18,300 from the $93,540, which would be $75,240. Dividing this by 1,254 acres would mean that he expected to buy the land at $60 an acre. This estimate of the value of the land was made June 1, 1936.[2]

SUMMARY OF ARGUMENT

I.

There was a taking for which the Fifth Amendment requires compensation. The Government's defense to as-

---

[2]Although not in the record, files of the engineers' office will show that this $93,540 was based on $60 an acre for the 1,254 acres, and $50 an acre for the 366 acres, which will total the $93,540.

serted taking in a case of this sort may assume two forms: (1) that there was no taking in a physical sense, as for instance the land was not touched or that there was a mere threat of taking; (2) that there was no taking because the Government exercised its dominant authority over a navigable stream and was therefore acting in pursuit of its legal rights, since one cannot take his own property. We shall discuss these two forms of taking in their order.

Land is taken "when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States* v. *Dickinson*, 331 U. S. p. 748. *United States* v. *Cress*, 243 U. S. 316, held that the right to have a nonnavigable stream flow away from one's land unobstructed except in the course of nature, was an interest in land, the destruction of which was a taking. This is also the law of Missouri and of many other states. Other decisions of the Supreme Court of the United States (*United States* v. *Williams*, 188 U. S. 485; *United States* v. *Lynah*, 188 U. S. 445) have held that causing injury to land by percolation, seepage and destruction of drainage where the agricultural value of the land was destroyed, was a taking for which compensation must be paid. In this case, there was not only destruction of drainage, there was pushing of water up into the land by increased height of the river and of holding it there so that water rose in the land and rendered it unfit for agriculture.

As to the second aspect of taking, although the Government has a dominant right as to subsurface land (land below high water mark) on a navigable stream, it has no such dominant right as to land on a nonnavigable stream. *Scranton* v. *Wheeler*, 179 U. S. 141, and other cases which established this rule of dominant right, hold that a riparian owner on a navigable stream owns the land

in the bed of the stream under a qualified title and always subject to the Government's right to use of the river for navigation. The *Cress* case, *supra*, held that the Government was liable for exercise of its power to regulate navigation if the exercise of that power caused a taking of land on a nonnavigable stream. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, involved injury to land in the bed of a stream, caused by raising the waters of a navigable stream to high water mark. It distinguished that case from the *Cress* case on the ground that the *Cress* case involved land on a nonnavigable stream and stated that the *Cress* case held where owner was on a nonnavigable stream he was entitled to compensation, and in *United States* v. *Willow River Power Company*, 324 U. S. 499, a case involving liability for changing the level of a navigable stream this Court construed the *Cress* case as holding that the right of the Government on a nonnavigable stream was not a dominant right and its rights and liabilities were governed by the rights and liabilities of other riparian owners. Under Missouri law and under the law of most states, a riparian owner has no right to dam a nonnavigable stream to the injury of other riparian owners on such navigable streams. There is undoubtedly liability as between riparian owners; hence there is liability here.

There was taking in this case even if there be no difference in the rule as to navigable and nonnavigable streams, because the injury was to fast lands. All of the land taken is above high water mark, which is 420.4 feet. The ground water in this land often rose to 422.5 feet. All of the land now involved was from 423.5 to 425 feet which is from a little over three to over four and one-half feet. The Courts have held that even on a navigable stream the Government is liable for taking of fast lands.

II

The description of the right taken, as found by the Court of Claims, is adequate. The finding of fact showed the property taken and the nature of the taking. The real objection seems to be to the word "privilege," defined by Webster as "a grant of a special right or immunity." If the word grant or right had been used the description given would have been that of an ordinary easement. No particular form of words is necessary to describe an easement.

The Government has the privilege of erecting and operating a dam on the Mississippi River without paying compensation to an owner of land on that navigable stream, even though, if the water is not raised above high water mark, his land may be injured or destroyed thereby. The Government does not have the privilege of doing so *without compensation*, if land injured or destroyed thereby, is located on a nonnavigable stream away from the Mississippi river. And the Court of Claims did not allow compensation for the "privilege". The compensation was allowed for taking the land.

III

The District Engineer of the War Department, after a thorough investigation of what injury this project would do to the land by seepage, backwater and cost of drainage, reported to Congress that a substantial part of the farm (1,254 acres) would be eliminated for agricultural purposes if the dam were erected and put in operation, and that some 366 acres would require expensive tiling and drainage. He therefore recommended that the Government pay to the landowner the cost of acquiring the 1,254 acres and the cost of tiling and drainage of the 366 acres, and that the money be made available therefor im-

mediately. Upon receiving the report, Congress authorized the project as recommended by the District Engineer. Congress therefore has directed payment for injury to this land even though what was done did not constitute a taking.

IV

The Tucker Act provides for recovery against the Government "upon any contract, express or implied, with the Government of the United States" (Mar. 3, 1887, c. 359, No. 1, 24 Stat. 505; Mar. 3, 1911, c. 231, No. 145, 36 Stat. 1136). The facts in this case establish an implied contract by the Government to pay for the injury to this land.

ARGUMENT

I. THERE WAS A TAKING FOR WHICH THE FIFTH AMENDMENT REQUIRES COMPENSATION

A. The United States by erection and operation of Lock and Dam No. 26 caused pushing up of water into the soil, percolation, seepage, and destruction of drainage

In the summary we have referred to the two aspects of taking. The Government relies expressly upon the second of these aspects of taking. But in the notes attached to Government's brief a great deal of time is spent urging there was no actual taking of the land. For this reason we will devote a portion of our brief to that question.

The Government asserts that this is a question of Government depriving this landowner merely of the right to drain his land through Dardenne Creek which empties into the Mississippi River. It is our view that under the authorities, where the stoppage of drainage results in complete water-logging and soaking land to the extent that it cannot be cultivated, this in itself constitutes a taking. This was the basis of the decision of the Court

of Claims, ". . . We see no real difference between burdening the land by artificially flooding it with water, which has often been held to be a taking, and converting it into a pond or a marsh by preventing the surface water which falls on it or flows on it, from higher land from leaving it by either surface or underground drainage" (Opinion of Court R. 38. 109 C. Cl., p. 575). But there is involved here more than a question of depriving the respondent of drainage to his land. The Court of Claims found that the ground-water in this land rose and fell as the river rose and fell. That would mean that since Dam No. 26 resulted in raising the river level and therefore the level of Dardenne Creek five feet it would raise the ground-water level in this land five feet.

Flooding the top of the land stops drainage but that is merely one cause of injury. The flood-water itself injures and ruins the land. Exactly the same thing applies when water comes from below, up into the land. That also stops drainage and prevents water coming through but there is the added water brought about by pressure from increased height of water in the river. As petitioner has stated in several places, water seeks its level and the finding of the Court which is simply a statement of the law of nature that ground water in the land rises as the river rises proves that water pushes up into the land when the height of the river is increased. In the normal rise of the river to highwater mark, where there is no dam to keep it there permanently, the ground-water will level off with the water in the river at a height below high-water level. But when the dam permanently holds this water at around 420 feet the result is a permanent keeping of the ground-water in this soil at 420, or usually above. Comment has been made about the finding that the water in the ground is higher than the water

in the river. This is based on recognized principle of physics known as capillary attraction. The water held in the land by reason of this pressure is drawn up a foot or more by capillary attraction. This is not peculiar to this land.

United States v. *Williams*, 188 U. S. 485, involved a situation almost exactly the same as in the case at bar which was held to be a taking. The facts are not set out in the decision of the Supreme Court. But from the Court of Appeals decision, *Williams* v. *United States*, 104 Fed. 50, p. 53, they appear to be as follows:

> The facts found show that by reason of the obstructions so placed in the Savannah River and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation, and forced on the land; the superinduced addition of water actually invading it, destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and, in addition thereto, holding back and restraining in, over, and upon said plantation the freshets, the water from which was retained upon the same; by all of which the plantation has been rendered absolutely valueless. All of which is the result of the Government improvements and works, and without which its purposes could not be carried out and effected. This is a "taking," within the meaning of the fifth amendment.

Seepage, percolation, and destruction of drainage, were also involved in *United States* v. *Lynah*, 188 U. S. 445, pp. 468-70, and this damage, with some overflow, which together rendered the land an irreclaimable bog, was held to constitute a taking.

In *Cress* v. *United States*, 243 U. S. 316, a dam placed in the Kentucky River caused Miller's Creek, a non-

navigable stream, to rise to such an extent that the owner's mill dam, situated thereon, could not be operated because the increased height of the water in the creek prevented the drop in the current necessary to run the mill. No part of the land or the mill was overflowed. The Court held this to be a taking. It said:

> . . . The right to have the water flow away from the mill dam unobstructed, except in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land. . . . (243 U. S. p. 330).

In discussing the question the Court (p. 325) referred with approval to the holding of the *Lynah* case that backing water up against the landowners' embankment and interfering with drainage of their plantation was a taking.

The *Williams*, the *Lynah*, the *Cress* cases together establish without question that seepage, percolation, and prevention of drainage, caused by a dam erected by the Government, constitute a taking if the land is seriously depreciated in value thereby.

Have any of these decisions been overruled? The *Williams* case has not been referred to again by this Court. The *Lynah* case has been questioned, debated, construed and interpreted, but it still remains the law on the question of taking. It was overruled in the *Chicago, M., St. P. and P. R. Co.* case, as to that part of the opinion holding the Government liable for injury to land in the bed of a navigable stream for raising its level to high water mark. But that case recognized as correct its decision on the question of taking (312 U. S. 592, p. 598); in *United States* v. *Dickinson*, 331 U. S. 745, p. 748, it was cited on the question of jurisdiction, and in *United States* v. *Causby*, 328 U. S. 256,

p. 261, Note 6, it was cited with approval, on the question of taking.

The *Cress* case has also been discussed in many decisions but never questioned on the principle of what constitutes taking and was quoted in *United States* v. *Causby*, 328 U. S. 256, p. 266, on its doctrine "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial that determines the question whether it is a taking". What possible difference could it make whether the flooding came from above the ground or below, if the effect is destruction of the land?

Many years ago the New York Court of Appeals took the view that there was no difference in a case where underground water had caused damage. It stated the doctrine as follows:

> . . . To hold that defendants would be liable, if their interference with the surface stream had damaged the plaintiff, by overflowing the natural banks and pressing it through the artificial embankment, but not, if they pressed it through the natural banks, would be about as sound legal justice, to my mind, as if we should hold a man liable for stabbing another in the bosom, but, if he stabbed him under the arm, though the knife should come to the same point in the body, there should be no liability . . . (*Pixley* v. *Clark*, 35 N. Y. 520, p. 530).

The Iowa courts, in a carefully considered case, *Healey* v. *Citizens' Gas & Electric Company*, 201 N. W. 118, p. 121, 199 Iowa 82, p. 90, have held likewise:

> . . . The *Pixley* case, and some of the other cases, hold that there is no difference in flooding one's land, whether it is by overflowing or underflowing (percolation). The water reaches the land, and injures or destroys its use, in either event. . . .

This Court, in the recent *United States* v. *Causby*, 328 U. S. 256, has established the doctrine that the old idea of taking, as a highly technical question requiring an actual physical invasion of the land, is no longer the law in this country. In that case, taking was asserted because airplanes were flown over chicken farm at a height of 83 feet (which was 63 feet above the barn and 67 feet above the house) causing chickens to be frightened and killed and rendering the property useless as a chicken farm. The land was not touched, the title was retained by the owner. The Government contended there was no taking and that the injury was consequential. The Court held that if by reason of such flights the owners could not use the land for any purpose the loss would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it. The Court said that the fact that planes never touched the surface "would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate" (p. 262).

This is precisely the situation in the instant case except that the injury was done by water from 3 to 5 feet under the ground. But if the Government's action 83 feet above the ground is a taking, certainly its action 3 to 5 feet under the ground is likewise so.

The fact that the owner is still in possession and that the land may have some value as a duck hunter's pond does not change the liability if part of its value has been taken. As said in the *Causby* case, p. 262, *supra*, ". . . The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain, but the use of the airspace immediately above the land would limit the utility of the land and cause a diminution of its value. . . ."

Partial taking is recognized in all the cases: *Jacobs* v. *United States*, 290 U. S. 13, p. 16, *United States* v. *Cress*, 243 U. S. 316, pp. 327-329, as is liability for taking of an easement, *United States* v. *Welch*, 217 U. S. 333.

The Government asserts there was no invasion of this land. If holding water continuously within three feet of the surface, which the Court found made the land unfit for agriculture, does not constitute an invasion of the land it is inconceivable what would. If this were due to destruction of an easement as in the *Welch* case, or had the effect of creating an easement as in the *Causby* case, it is none the less a taking. If "respondent could not use this land for any purpose, their loss would be complete". If "some value would remain it would nevertheless 'limit the utility of the land and cause a diminution in its value' ". In any event it would be a taking.

The difference between taking and damage is illustrated in *Peabody* v. *United States*, 231 U. S. 530 and in the two *Portsmouth* cases. In the *Peabody* and the first *Portsmouth* (250 U. S. 1) cases, only a few shots were fired over the land. This was held to be not sufficient to create a servitude. But when the firing became permanent, continuing day after day, the Court held it did become a servitude and constituted a taking. (*Portsmouth Harbor Land & Hotel Company* v. *United States*, 260 U. S. 327). If the Government had merely raised this river on one occasion causing damage to crops it would not have been a taking of the land. But when as a part of a permanent policy of the Government already continued in effect for ten years the river is kept at such level as to destroy the land for farming purposes, and such policy is to continue from now on it certainly becomes a taking.

On the question of taking by destroying subsurface drainage the petitioner cites three cases, all of which are distinguishable from the instant case.

(1) In *Lynn* v. *United States*, 110 F. 2d 586, the land was on a *navigable* stream and the decision was based on the dominant right of the Government on such streams and not on the question whether injuring the drainage was a taking. In that case, also, the Government had paid for the land and covered by that payment, the damage claimed.

(2) In *Christman* v. *United States*, 74 F. 2d 112, flash floods rushing down a comparatively steep descent swept over the land doing serious damage and the Court held that the flood, not the dam, caused the injury.

(3) *United States* v. *Meyer*, 113 F. 2d 387, holds that an interference with subsurface drainage is not a taking within eminent domain power. The facts in that case were not stated; it does not appear whether the stream was navigable or nonnavigable; the cases cited were not subsurface drainage cases. It is, therefore, of little value and is in conflict with the Supreme Court cases heretofore cited.[3]

On questions of access and what are sometimes referred to as intangible rights, on which there are several Supreme Court cases which hold there is no right to recovery, it must be borne in mind that all of these

---

[3]There are many decisions of United States District and Circuit Court of Appeals sustaining respondent's position that injury to the land of the character shown in the instant case, is a taking. *United States* v. *Chicago, B. & Q. R. Co.*, 82 F. 2d 131, p. 139; *United States* v. *Wabasha-Nelson Bridge Co.*, 83 F. 2d 852, p. 854; *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161, pp. 169, 170; *King* v. *United States*, 59 Fed. 9, p. 12.

cases involve property on a navigable stream and the question is so intermingled with dominant right of Government to utilize navigable streams in the interest of navigation that they are not really cases sustaining the view that in other situations, not involving that dominant right, recovery cannot be had for deprivation of access. For instance, in *Mills* v. *United States*, 46 Fed. 738, one of the cases relied on by the Government, the land was on the navigable tidewater of the Savannah River and plaintiffs asserted the right to the continued use of the ebb and flow for their drainage. The case was decided on the basis that "all the right they have in the ebb and flow of the tide of the Savannah River is subordinate to the control of the Government over that navigable stream, for its free navigation for the public" (p. 747) and in discussing the question of destruction of drainage the Court said (p. 738):

> . . . It would seem to be otherwise if the stream were not navigable, but upon navigable waters any franchise depending upon the use of the stream itself seems to be common to all, and to relate to the purposes of navigation and to facilities therefor. . . .

In the *Willow River Power Company* case, also, the Court refers to the Government's right to change the level of a navigable stream and its lack of such right in a nonnavigable stream (324 U. S. p. 506). In all of these cases it is specifically stated that the land has not been touched or injured in any way. In the instant case the land has been made into a pond or a marsh as the Court of Claims found (R. 38).

The rule established in the *Cress* case, previously quoted, that an owner of land has the right to have a nonnavigable stream flow away from it unobstructed except in the course of nature, is generally established by

many cases. It is the rule in Missouri. In *Greisinger* v. *Klinhardt*, 321 Mo. 186, p. 193, 9 S. W. 2d 978, p. 980, the Court said, ". . . The right to the flow of a natural non-navigable stream, in its natural way, applies to upper and lower owners of land across which the stream flows . . .".[4]

Nor can one, under Missouri law, dam a nonnavigable stream and cause water to flow back on another's land. (*Keener* v. *Sharp*, 341 Mo. 1192, p. 1195, 111 S. W. 2d 118, p. 120). After stating that in Missouri surface water is a common enemy which every man may ward off providing he does not unnecessarily collect it and discharge it to the damage of his neighbor, the Court says: "It is also settled in Missouri that a natural stream cannot be dammed up nor the waters from its beaten path or bed diverted to the damage of property without compensation therefor. . . ", and that the waters of a stream "may be made up, more or less, from surface water from rains and melting snow, but after it enters into a channel and commences to flow in its natural banks, it is no longer to be considered surface water, . . .". (341 Mo. p. 1196, 111 S. W. 2d, p. 120).

In one of the notes of Government's brief, suggestion is made of consequential damage as distinguished from taking. Consequential damage is a term of such uncertainty and of such conflicting meaning that it is difficult to determine its application in a particular case. We do not think, however, that it applies in this case in any way.

---

[4]That this is the general rule is evidenced by many cases. A few of the most recent are: *Olson* v. *Roscoe*, 30 N. W. 2d 664; *Larson* v. *Remeikis*, 76 N. E. 2d 922; *Turner* v. *Hopper*, 188 Pac. 2d 257; *Reese* v. *State*, 72 N. Y. S. 2d 209; *Logsdon* v. *Anderson*, 30 N. W. 2d 787; *De Ruwe* v. *Morrison*, 184 Pac. 2d 273; *Schmahl* v. *Ackerson*, 74 N. E. 2d 614; *Beals* v. *Robertson*, 52 Atl. 2d 316, 356 Pa. 348; *Costello* v. *Bowen*, 182 Pac. 2d 615.

It is sometimes used in connection with cases where the Government has exercised its dominant right to raise the level of a navigable river and is there used to mean the damage consequent upon the Government doing an act in pursuance of its legal right or easement in the property. That meaning would not apply here. It is also used in reference to an injury done which could not have been anticipated. The leading case on this subject, *Hadley* v. *Baxendale*, 9 Websby, Hurlstone & Gordon's Reports (Exchequer) 341, decided in England in 1854, established this principle. Such also was *Sanguinetti* v. *United States*, 264 U. S. 146, pp. 147, 148, where the Court said:

> It was not shown, either directly or inferentially, that the Government, or any of its officers, in the preparation of the plans or in the construction of the canal, had any intention to thereby flood any of the land here involved, or had any reason to expect that such result would follow. That the carrying capacity of the canal was insufficient during periods of very heavy rains and extremely high water was due to lack of accurate information in respect of the conditions to be met at such times. . . .

This was the basis also of the *Horstmann* case, 257 U. S. 138. But in the instant case the Government not only could have, but did anticipate what occurred, as evidenced by the extensive report of the engineers approved by Congress.

One other phase of consequential damage is sometimes referred to where an independent agent intervenes and it, and not the act complained of, causes the injury. Such a situation would arise, if, after a dam was put in operation a flood occurred which swept everything before it and would have destroyed the land whether the dam were there or not, and though the dam may have

contributed something to the injury, that contribution was negligible and would not have caused the injury. Such was *Christman* v. *United States*, 74 F. 2d 112, cited by Government where a flash flood swept down from the hills with great suddenness and really caused the injury. That is certainly not the situation here where the erection of the dam and the resulting elevation of the water raised the ground water in the land and holds it so that the land is rendered valueless for farming purposes. In the *Causby* case the same question was raised, and the Court said that the damages were not merely consequential but were a product of a direct invasion of respondent's domain, even though the land was not touched (328 U. S. pp. 265, 266).

B. The United States must pay compensation since it raised the waters of a nonnavigable stream to high water mark, destroying the land for agricultural purposes

The second aspect of taking, the question of the dominant right of the Government to utilize a navigable stream up to high water mark without liability, is the point stressed by the Government. Does the limited right of the riparian owner on a navigable river to the submerged land in front of his fast land as against the dominant right of the Government, apply to an owner on a nonnavigable stream?

Under Missouri law a riparian owner on a navigable river holds title to low water mark (*Hartvedt* v. *Harpst*, 173 S. W. 2d 65, p. 69). On a nonnavigable stream he has title to the whole bed if the entire stream is on his property and to the thread or middle of the stream if the stream runs between his land and that of another (*Brown* v. *Wilson*, 348 Mo. 658, p. 665, 155 S. W. 2d 176, p. 179).

For many years it has been the rule that the owner of land on a navigable stream (even though under state law he has title to the land between high and low water

mark) has only a limited title to the submerged land subject always to the dominant power of the United States to do whatever may be necessary as to the navigable stream in the interest of navigation. Perhaps the clearest statement of the rule is that made in *Scranton* v. *Wheeler*, 179 U. S. 141, p. 163:

> . . . The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. . . .[5]

---

[5]This rule has been applied in several types of cases:

(1) Where buildings erected between high and low-water mark of a navigable stream are destroyed: *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251; *Willink* v. *United States*, 240 U. S. 572; *Lewis Blue Point Oyster Culture Co.* v. *Briggs*, 229 U. S. 82; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, p. 599.

(2) Where riparian owner is deprived of access to navigable stream, but the land is not touched: *Scranton* v. *Wheeler*, 179 U. S. 141; *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Commodore Park*, 324 U. S. 386, p. 390.

(3) Where the Government deprives the riparian owner of the previous flow of the navigable river: these are mostly waterpower cases but they emphasize another phase of the dominant power of the Government over navigable water: *United*

It will be noted that the basis of this rule is that the owner of land on a navigable stream does not have, so far as the Government is concerned, a complete title to the land between low and high water mark. He buys the property with the easement of dominant right of the Government qualifying his title. It is just as if he had bought land on which there was an easement of record and when he buys the land just in the same way as any limitation of title will qualify his right, so he buys this land subject to that qualification. There is a definite reason for this rule. First, from the Government's standpoint, the stream is a navigable stream over which the Government has complete control and always has had and that control means the right to alter, divert or dam the stream whatever may be the effect of same on the riparian owners' lands between low and high water mark. Second, one who buys real estate on a navigable stream is instantly put on notice

---

States v. *Appalachian Electric Power Company*, 311 U. S. 377, p. 423; *United States* v. *Willow River Power Co.*, 324 U. S. 499. And this rule is true even if the flow of the river is in excess of needs of navigation: *United States* v. *Chandler Dunbar Water Power Company*, 229 U. S. 53.

(4) Where the Government erects levees on navigable streams to protect against floods and extraordinar, water rises: *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *United States* v. *Sponenbarger*, 308 U. S. 256; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351, p. 363.

Bedford v. *United States*, 192 U. S. 217, was also a case of dominant right of the Government in a navigable stream. The injury was due to natural causes (the Mississippi having changed its course by cutting through a narrow neck of land and through the course of years injuring claimant's land by erosion) but claimant undertook to establish injury on the basis of what the river might not have done if the Government had not placed a revetment along the shore some distance from claimant's land after the river broke through. The Court held this entirely speculative.

that the Government must necessarily regulate, alter, divert or place a dam in the stream if commerce and navigation require it. For he has but to look out upon this large stream with river traffic upon it and power potentialities apparent, to see the necessity for the exercise of the Government's power over navigation. He knows he cannot use this stream or the land under it as he can his upland, just as one owning land adjacent to a public highway knows he cannot place his buildings out in the highway. But, because of the many advantages of the navigable stream for power, for docks and for shipping, he is willing to buy and assume the risk of the Government taking action which may curb his activities. For, even with the restrictions on his submerged land, he has a property much more valuable to him than property some distance inland.

Neither of these reasons apply to one who buys farm land inland a mile and a half or more back of the navigable stream. We do not say that circumstances cannot arise under which the Government may have the power to regulate a tributary of a navigable stream, where the safety of the public is at stake. But here is a creek, 2 or 3 feet deep as the Court found, and a mile and a half from the navigable river. It is hardly conceivable that any interests would be involved except those of the farmers who operate along this creek, who perhaps water their stock there, or drive their cows across it and utilize it as any farm property. And there is certainly no reason that anyone buying a farm here would be put on notice of any power of the Government to regulate this small creek in the interest of navigation. He buys seeking no advantage of the navigable stream, he assumes no risk going with the advantages of a navigable stream.

It seems to us entirely logical that the farther away from the river one is the greater his right to be free from injury to his land by the Government.

In every instance where this dominant power has been sustained, the land has been on a navigable stream and in every such instance the Court has commented on the fact that no fast land or land above the high water level has been touched. Typical of the cases which have sustained this right of the Government to take without compensation is the case of *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, where the *property injured was in the bed of the stream* between low and high water mark. The railroad had built its tracks placing them on an embankment and riprapped the embankment so as to protect it from water. The court very properly held that the railroad's title to land in the bed of the stream was a qualified right always subject to the superior right of the Government.[6]

This Court, in *Chicago, M., St. P. & P. R. Co.*, (312 U. S. p. 597) referring to the *Cress* case said:

> . . . In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. . . .

And it was because in the *Cress* case the land was on a nonnavigable stream and the land in *Chicago, M. St. P. & P. R. Co.* case on a navigable stream that the *Cress* case was held to be not applicable.

Counsel for Government devote a considerable part of their brief to the contention that the *Cress* case was not one where low and high water mark was considered. We have not cited the *Cress* case as one involving high

---

[6]This was the situation also in *Hood* v. *United States*, 49 C. Cls. 669 and *Kelley's Creek and N. W. R. Co.* v. *United States*, 100 C. Cls. 396, cited by the Government.

and low water mark. What we do say is that it establishes a principle which is applicable to high and low water mark cases. For, as construed by later decisions of this Court, the *Cress* case establishes the doctrine that the dominant right of the Government as to a navigable stream does not extend to a nonnavigable stream. And as the right of the Government to raise the waters of a river to high water mark is based solely on such dominant right, it necessarily follows that the effect of the establishment of this principle in the *Cress* case would be that the Government does not have the right to raise the water to high water mark on a nonnavigable stream without compensation, if a taking results. The Government says that the *Cress* case does not decide that the rights on a nonnavigable stream are different from those on a navigable stream. Our best answer to this is that this Court says that it does.

In *Willow River Power Company* case, also relied upon by the Government, the land was on a navigable stream and the court specifically distinguished the case from the *Cress* case on the basis of that "case having to do with the land on a non-navigable stream."[7] The court definitely distinguishes between the dominant right of the Government as to land on a navigable stream and its right in a nonnavigable stream (324 U. S. pp. 505-506):

> The doctrine of riparian rights attained its maximum authority on nonnavigable streams. No overriding public interest chilled the contest between

[7] In *Willow River Power Company*, case, there are several differences from this case. In the first place, Willow river had been itself changed and the owner had created an artificial flow of the stream higher than its natural flow. It is specifically stated that no fast lands were flooded or injury done to the property or any use of it other than the right to use the river for power.

owners to get the utmost in benefits from flowing streams. Physical conditions usually favored practical utilization of theoretical rights. In general nonnavigable streams were small, shifted their courses easily and were not stable enough to serve as property lines as larger streams often do. They were shallow, could be forded and were no great obstacle to tillage or pasturage on two sides of the stream as a single operation. Such streams, like the lands, were fenced in; and while the waters might show resentment by carrying away a few spans of fence in the spring, the riparian owner's rights in such streams were acknowledged by the custom of the countryside as well as recognized by the law. In such surroundings and as between such owners equality of benefits from flowing waters was sought in the rule that each was entitled to their natural flow, subject only to a reasonable riparian use which must not substantially diminish their quantity or impair their quality. It was in such a stream that this Court found Cress as a landowner under the law of Kentucky possessed "the right to have the water flow away from the mill-dam unobstructed, except as in the course of nature." 243 U. S. 316, 330.

Referring again to the *Cress* case the Court said (p. 506):

> . . . The Government there was charged with the consequences of changing the level of a non-navigable stream; here it is sought to be charged with the same consequences from changing the level in a navigable one. In the former case the navigation interest was held not to be a dominant one at the property damaged; here dominance of the navigation interest at the St. Croix is clear.

The Court further held that in the *Cress* case the rights of the riparian owner against the Government improving navigation was measured by the standard evolved to measure the rights of riparian owners against each other and that the Government on such a stream was,

under the *Cress* case, held to have no greater rights than the riparian owner and therefore, not paramount to the rights of Cress (324 U. S. p. 506). If this does not clearly establish the rule that the right of the Government is not dominant as to land on a nonnavigable stream and that the rule set forth in the line of cases illustrated by *Scranton* v. *Wheeler* does not apply to land on a nonnavigable stream we do not see how words could be used to convey that fact.

Even in the *Causby* case where rights in the air were involved the Court distinguished between "navigable airspace" (300 to 1000 feet) which Congress placed within the Public Domain and space below (324 U. S. pp. 263, 264). The lower air space was that which the planes invaded in that case. The effect of this distinction was to hold that if the air invaded was not "navigable airspace" it was not subject to the dominant right of the Government.

C. There was liability since injury was to fast land

Even if it should be assumed that there is no distinction between riparian rights on navigable and nonnavigable streams, it should be noted that the injury in this case is to fast land. High water mark at Dardenne Creek as found by the Court was 420.4 feet. The lowest land for which the Court allowed compensation was 423.5 feet and most of it between 424 and 425 feet. So that the land injured was 3 to 4½ feet above high water mark. The water was often as high as 422.5 feet and was kept permanently at 421 (within 3 feet of land at 424) which is almost one foot above high water on a large tract of land involved. As this Court said, in referring to land on a navigable stream,

> ". . . High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a

taking for which compensation must be paid. . . ." (*United States* v. *Willow River Power Company*, 324 U. S. 499, p. 509).

II. FINDING OF THE COURT OF CLAIMS IS ADEQUATE AS TO WHAT PROPERTY INTEREST WAS TAKEN

Petitioner, under Point II of its brief, as we understand it, asserts a failure of the Court below in its findings accurately to describe the property or interest taken and, reasoning from that false assumption, argues that the compensation awarded respondent in the judgment, not being awarded for any particular property or interest taken, necessarily amounts only to a penalty imposed upon the Government for the "privilege" of carrying on the Governmental activity of improving navigation on the Mississippi River, a "privilege" paramount in the Government and one over which respondent exercised no right or control and for the exercise of which respondent could exact no compensation. This assumption or premise is untenable and the argument unsound.

In Findings 24, 26 and 27 (R. 34, 35) the Court below specifically described the three tracts of land for the taking of which compensation was awarded. Two plats are made part of findings. These plats are based on extensive surveys of the Government and are a part of the record here. By referring to them, anyone could locate the land for which compensation was awarded. The nature and extent of the taking is set out and described in Findings 18, 19 and 20 (R. 31, 32) and is found to consist not only of obstructing and delaying the drainage of surface water from respondent's land but as well, a shutting off almost entirely, of the drainage of underground water from the land, as well as an invasion of the land itself by underflooding and raising the water table under the land from four to five feet higher than it was prior

to the erection of the dam. It is this invasion or taking of respondent's property interest in the land in question, a permanent condition, which the Court below found was directly attributable to the exercise by petitioner of its privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction, for which compensation was awarded. It will be seen immediately that, contrary to petitioner's argument, compensation was awarded not for petitioner's "privilege" of carrying on the governmental activity of improving navigation in the Mississippi River, as to which its right is paramount, but on the contrary was awarded for the taking of a fixed and determinable property or interest in the land in question (which was on a nonnavigable stream) resulting from the exercise by petitioner of that "privilege" for which the Constitution requires compensation.

In that part of the opinion of the Court of Claims describing the legal effect of the property interest found to have been taken, it said, ". . . It is the kind of an incident of ownership that could have been granted by the plaintiff to the Government or a neighbor, the privilege of holding surface and underground water in the plaintiff's land, to its detriment as agricultural land. Such a grant would have created a burden *in rem* upon the plaintiff's land, which would have passed to subsequent owners and bound them. . . ." *Kansas City Life Insurance Company* v. *United States*, 109 C. Cls. 555, p. 575 (R. 37, 38). But the property taken and the method of taking are described in the findings of fact.

An easement is not required to be expressed in any particular language. If the language sets forth in clear terms what the rights of the parties are, it will constitute

an easement even though the word "easement" is not used. The only reason for any discussion is the use of the word "privilege."- Webster defines "privilege" as a "grant of a special right or immunity." Suppose the word "grant" or "right" were substituted for "privilege" so that the language of this finding should read, "The right exercised by the Government for which the plaintiff is given compensation in this case is the right granted to it, of permanently maintaining . . . .", *et cetera*. That would involve the ordinary language of an easement. But it would be no clearer and mean nothing more than the finding which the Court below has made. This finding, and it is contained in the findings of fact and not in the opinion, definitely described a permanent easement, the language being "permanently maintaining" and refers to both present and future use at its present height. The height at which the dam may be maintained is described as its present height.

Petitioner complains that the finding of the Court of Claims improperly limits the Government's "privilege" to "permanently maintaining Lock and Dam No. 26." The only issue in this case pertains to the taking of plaintiff's property or interest in the land in question, and compensation therefor, resulting from the construction and operation by the Government of Lock and Dam No. 26. The findings were responsive to that issue. The extent of the invasion or taking of respondent's property as a result of the construction and operation of that dam has been found and determined. If later the Government builds and operates other dams affecting this same property but with no further underflowing or taking of respondent's property and interest therein, then respondent can claim no further compensation for the present invasion or taking which has been bought and paid for by this award. Such, however, is not the issue in this case. The issue is as to the destruction and taking of respondent's property or

interest in the lands in question resulting from the Government's construction and operation of Lock and Dam No. 26. The findings and judgment of the Court of Claims are properly responsive to that sole issue. A broader finding would be unwarranted and a narrower finding not sufficient.

III. THE COURT OF CLAIMS WAS AUTHORIZED TO RENDER JUDGMENT FOR RESPONDENT ON BASIS OF ACT OF CONGRESS WHETHER OR NOT THERE WAS A SERVITUDE OF THE GOVERNMENT OR A TAKING

The Government concedes that Congress may by legislation waive Government immunity and make itself liable in cases where normally it would not be held so. It contends that in this case there has been no such waiver by Act of Congress.

We have stated the facts. The report of the District Engineer advised Congress that seepage, backwater and injury to drainage would completely eliminate for agricultural purposes a large part of this land (1,254 acres) and that 366 acres could be saved only by expensive tiling and drainage, and recommended that the Government pay to the owner the price of the land and the cost of drainage which would be much less than the expense to the Government in doing the remedial work on the entire 1,620 acres. And he recommended that this money, including money for six other districts, be made available immediately. It is quite evident that the District Engineer intended that the money be made available so that these amounts could be paid forthwith to the various claimants. Otherwise, there would have been no reason to ask that the money be made available immediately and Congress evidently agreed because it specifically approved the project on the basis of the engineers' recommendation. The recommendation of the District Engineer was ap-

proved by the Division Engineer, the Board of Engineers of Rivers and Harbors, and the Chief of the Engineers (Fdg. 8, R. 25).

Congress had before it all the facts as to the nature of the injury which would be suffered by these landowners, and consequently, could not have intended anything other than payment as recommended. Counsel for the Government takes the position that this was merely permission on the part of Congress for the engineers to adjust these claims. But that is not what the District Engineer recommended. He did not ask that the Secretary of War be given any discretion in the matter. He simply requested Congress to give the Secretary of War authority to purchase the low-lying lands and that it provide the money to do this with, which Congress did. The Act of August 26, 1937, 50 Stat. 844, 848, provided that the existing project "is hereby modified in accordance with the recommendation of the District Engineer" (R. 26). Undoubtedly a Federal Statute waiving Immunity of the Government must be clear. But the fact that it is short does not make it any less clear. Certainly the Secretary of War could not defeat the purpose of Congress by refusing to purchase or condemn if he nevertheless proceeded to do what Congress directed and thus injured the land without paying the compensation.

One of the cases cited by Government's counsel in the original argument of this case was *Dismuke* v. *United States*, 297 U. S. 167, where a veteran brought a suit on an annuity. The law under which he sued provided that the Commissioner of Pensions "shall forthwith adjudicate the claim of the applicant". The Commissioner of Pensions had denied the claim and when suit was filed in the Court of Claims the point was made that the Court had no jurisdiction because of such fact. The Court held there was

jurisdiction and stated, ". . . But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled . . ." (p. 172). There the Commissioner of Pensions was specifically given the power to adjudicate. Yet it was held he could not defeat the desire of Congress.

Mitchell et al. v. *United States,* 267 U. S. 341, is cited as holding that there can be no recovery. In that case, the suit involved was for injury to a business, not to land. The land in fact had been paid for. The Court specifically held, " . . . The claim now asserted is on account of property other than that for which the Act provided that compensation should be made. . . ." (p. 344). It further stated, ". . . The Act authorized the taking only of land and appurtenances and improvements attached thereto." The Act respondent relied upon specifically provided for the taking and payment for this very land.

In *United States ex rel.* v. *Wilbur,* 283 U. S. 414, the Secretary of the Interior had refused to grant a license to exploit oil on Government property, the statute permitting him to grant such a license. Mandamus was brought to compel the issuance of the license. The Court properly held that the Secretary of the Interior had a discretion in this matter and could not be made to issue the license by mandamus. That case is certainly not applicable here.

The second point made by the Government in reference to this claim is that the Act of Congress provided for the taking of 1,254 acres and the payment for tiling and drainage of the 366 acres, and that the Court in this case merely allowed compensation for an easement which does not provide title in the Government. And on the

same theory it contends that as the Act of Congress allowed compensation for 1,620 acres and the Court found depreciation in value in only 1,107.96 acres, the judgment does not cover the same land.

If Congress authorized the taking of 1,620 acres of land, could it be contended that the War Department did not have the right to bring condemnation for 1,100 acres if it decided that was all it needed? Or would anyone say that if Congress authorized taking the fee and the War Department decided it needed only an easement, that it could not bring condemnation for an easement? If this is true then the War Department certainly does not have the right to injure the land without bringing condemnation and then assert that respondent has no right to recover because the injury was less than they had figured it would be. As stated in the *Cress* case:

> . . . Where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property-owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require. . . and it appears that less than the whole has been taken and is to be paid for, such a right of interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking; and where, as in this case with respect to the six and six-tenths acres, land is not constantly but only at intervals overflowed, the fee may be permitted to remain in the owner, subject to an easement in the United States to overflow it with water as often as necessarily may result from the operation of the lock and dam for purposes of navigation. (243 U. S. p. 329)

The contention is also made that in some way this theory of respondent would enlarge the scope of the judgment. Respondent has received the judgment for the limited amount found and has not brought certiorari and the petitioner's rights have been found. There is no way in which the respondent could recover a larger amount or claim any further compensation. It is inconceivable on what theory respondent could impose upon the United States the amount of $93,540, when its judgment is for only $22,519.16, and is final as to respondent.

The United States will not obtain fee title to the 1,254 acres but neither is it paying for the fee title to 1,254 acres and it cannot be asserted that 1,620 acres of land have been acquired when the judgment simply allows an easement on 1,107.96 acres. The fact that less acres are found to be reduced in value than the engineer asserted does not mean it is other land.

IV. THE UNITED STATES IS LIABLE UNDER TUCKER ACT BECAUSE THERE WAS A CONTRACT TO PAY IMPLIED IN FACT

There is a further basis for this claim founded upon the recommendation of the District Engineer and the approval of same by Congress. Under the Tucker Act the Court of Claims has jurisdiction and the Government is liable for claims founded "upon any contract, express or implied, with the Government of the United States." The action of the Army Engineers and Congress in approving their action certainly constitutes an implied contract to pay for this land, if the land was injured thereby, even if the question whether or not it constitutes a taking is eliminated.

CONCLUSION

". . . The Fifth Amendment," said this Court in *United States* v. *Dickinson*, 331 U. S. 745, p. 748, "expresses a prin-

ciple of fairness and not a technical rule of procedure enshrining old or new niceties . . .". Considered as a rule of fairness the Fifth Amendment requires compensation here. The trend of judicial thought is toward paying compensation where injury is done by the Government. This also is the trend in legislative thinking in this country and in England, as evidenced by the Federal Tort Claim Act[8] and the English Crown Proceeding Act, 1947[9] under which suit may now be brought in England against the Crown.

In the report made by the Chief of Engineers in response to one of the resolutions offered in Congress, he said that, in this project, the damages are small with respect to the project as a whole but serious with respect to the people whose lands were affected.[10] We respectfully submit that this will prove true in most instances where the land taken is back in the country in the rural districts. But of one thing we can be sure. It will prove serious and ruinous to the man operating a farm some distance away from the river.

The payment of $22,500 or $30,000, the amount of the judgment in this case, would be very small indeed compared to the expense of the Government project involved. But the establishment of the precedent sought here, the extension of the rule applicable to land on navigable rivers to that on nonnavigable streams, contrary to the present settled rule, will be very far-reaching indeed, for it will mean that many farmers, large and small, will face the prospect and a very definite prospect, of having their farms

---

[8]Act of Aug. 2, 1946, c. 753, Title IV, 60 Stat. 842; Act of Aug. 1, 1947, c. 446, 61 Stat. 722.

[9]10 and 11 George 6, c. 44.

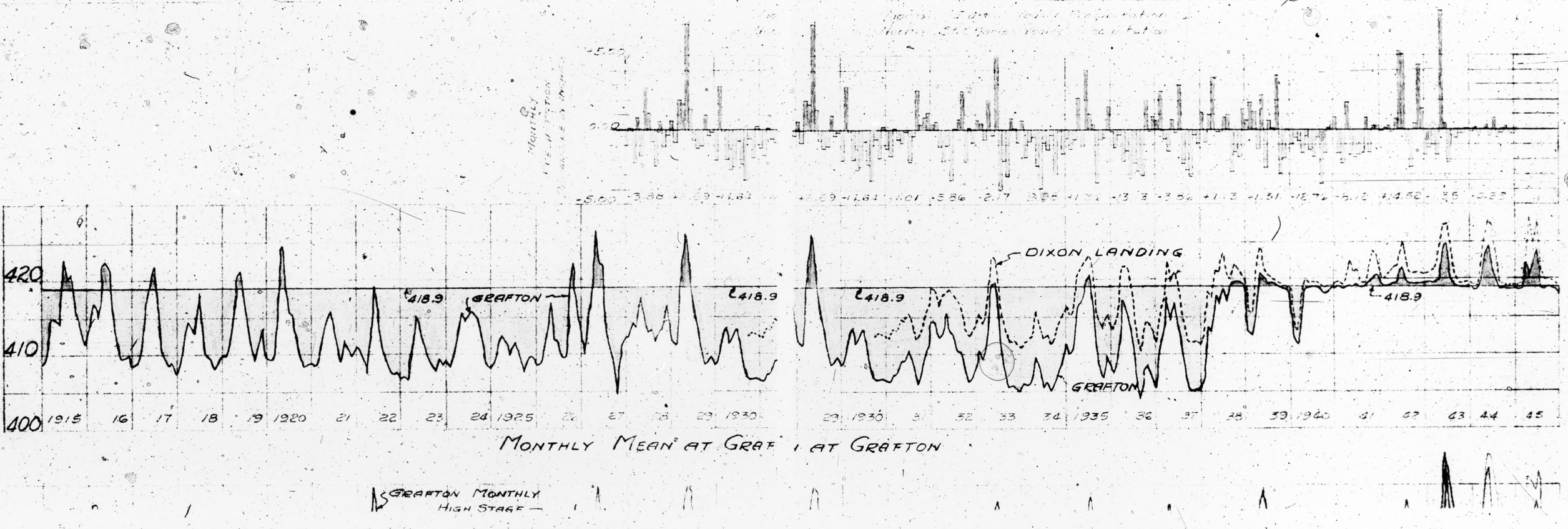
[10]Document No. 34, 73rd Congress, 2nd Session, p. 3.

destroyed or seriously impaired in value without being paid a dime of compensation and through no fault of their own.

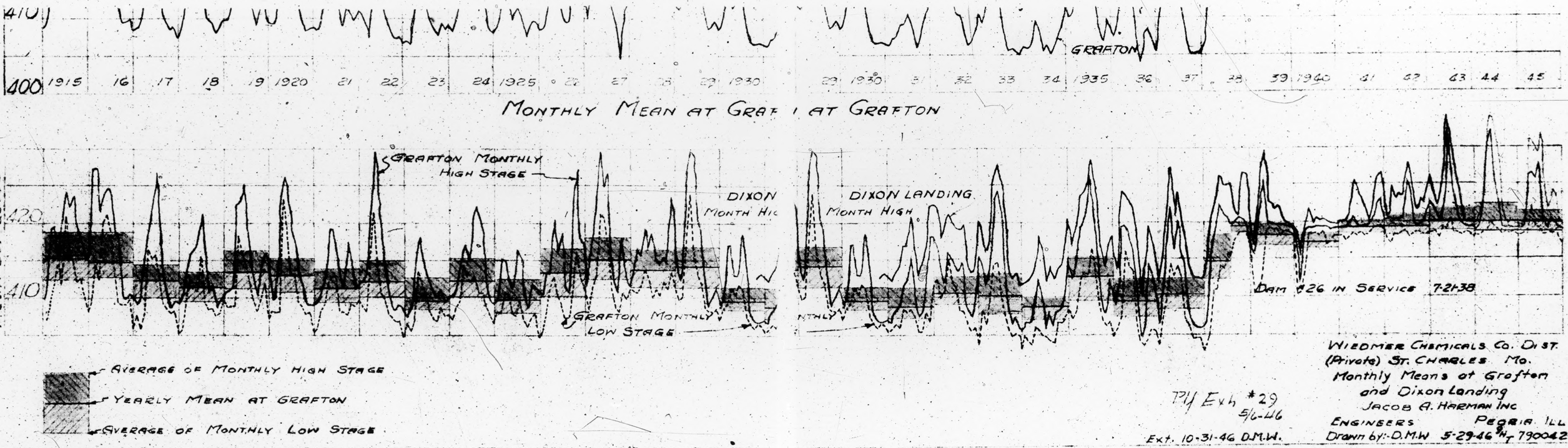
When the social values are weighed, as they should be, it will be found that the expense to the Government in paying for these lands will be small indeed as compared with the harm done by a policy of destroying or injuring land without compensation when equity and fairness are all in favor of paying for it.

It is respectfully submitted that on the basis of precedent, reason, and social value, the rule for which respondent contends, should be reaffirmed.

RAY B. LUCAS,
STANLEY BASSETT,
3520 Broadway,
Kansas City 2, Missouri,
Attorneys for Respondent, Kansas City Life Insurance Company.



MONTHLY MEAN AT GRAFTON AT GRAFTON



PH Exh #29
5/6-46

Ext. 10-31-46 D.M.W.

WIEDMER CHEMICALS CO. DIST.
(Private) ST. CHARLES MO.
Monthly Means of Grafton and Dixon Landing
JACOB A. HARMAN INC
ENGINEERS PEORIA ILL
Drawn by:- D.M.W 5-29-46 H.T. 790042

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAR 2 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 1

THE UNITED STATES OF AMERICA, *Petitioner*

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR KANSAS CITY LIFE INSURANCE COMPANY IN REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

RAY B. LUCAS,
STANLEY BASSETT,
3520 Broadway,
Kansas City 2, Missouri,

Attorneys for Respondent, Kansas City Life Insurance Company.

INDEX

Statement 1

Summary of Argument 2

Argument—

I. Dominance of Government as to submerged land on a navigable river does not extend to land on a small non-navigable stream 3

A. Compensation by Government for land taken does not destroy Government's paramount power 3

B. Taking land on a nonnavigable stream without compensation is neither legal nor fair 4

C. Changing the grade of a public highway is not analogous to changing the water level of a small nonnavigable stream 5

II. A landowner has title to the middle of a nonnavigable stream bordering his land with drainage rights therein 7

A. Under Missouri law if land is bordered by non-navigable stream, as the court below found this land to be, the owner's title extends to the middle of the stream 7

B. Rule that surface water is a common enemy does not apply here 9

(1) Surface water rules do not apply where water is collected and thrown back by a large dam 9

(2) Water that has entered a water-course with well defined channel does not constitute surface water though it may be composed in part of surface water 9

(3) Protection against surface water not sought by Government in this case 9

C. Government's paramount power could not be defeated by selling two feet of land bordering a navigable stream 9

D. Size of land immaterial insofar as its character as riparian land is concerned 10

Conclusion 11

CITATIONS

TABLE OF CASES:

Bratschi v. *Loesch*, 330 Mo. 697, 51 S. W. 2d 69 ..... 3, 8
Christy v. *Chicago, B. & Q. R. Co.*, 212 S. W. 2d 476 ..... 2, 6
Dardenne Realty Co. v. *Abeken*, 232 Mo. App. 945, 106 S. W. 2d 966 9
Jones v. *Conn*, 39 Ore. 30, 64 Pac. 855 10
Keener v. *Sharp*, 341 Mo. 1192, 111 S. W. 2d 118 ..... 3, 9
Scranton v. *Wheeler*, 179 U. S. 141 7
United States v. *Welch*, 217 U. S. 333 ..... 2, 6
United States v. *Willow River Power Co.*, 324 U. S. 499 4

MISCELLANEOUS:

Restatement of the Law of Torts, Vol. IV, Chapter 41, §44, 3 (c), p. 327 10

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 1

THE UNITED STATES OF AMERICA, *Petitioner*

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR KANSAS CITY LIFE INSURANCE COMPANY IN REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

STATEMENT

The Government has filed a supplemental brief restating the position taken in its original brief and raising some new questions.

In replying thereto we have not attempted to deal with any questions other than those covered by the Government's supplemental brief. Questions such as our contention that the water was raised above high water level and that Congress by legislation covering this specific project has authorized payment of compensation are fully covered in the original brief.

SUMMARY OF ARGUMENT

I

The paramount power of the United States as to submerged lands on a navigable river does not extend to a small nonnavigable creek far from the river so as to give the United States the right to take without compensation land on such creek. Both Congress and this Court have always recognized such distinction.

To require compensation does not destroy in any practical sense the Government's dominant power. The cost of taking the land in the case at bar is so small compared to the total cost of the project it becomes insignificant.

That a state may grade a highway without paying damage to an adjoining landowner is not analogous to the United States backing water into a nonnavigable small creek thus making a swamp and bog of a farm bordered by such stream. The state would not have the right without paying compensation to change the grade of a privately owned country lane some distance away from the public highway. Even as to a public highway it is doubtful if a state has the right to so block the property adjoining it as to completely isolate and destroy the property. This Court, in the case of *United States* v. *Welch*, 217 U. S. 333, has held that if destruction of a private way deprives an owner of every way to get to the road, this is a taking and compensable. Missouri cases hold likewise. *Christy* v. *Chicago, B. & Q. R. Co.*, 212 S. W. 2d 476, p. 479.

II

An owner of land bordered by a nonnavigable stream owns to the middle of the stream, thus being a riparian owner with the right to have his drainage flow into the stream. The court below found as a fact that Dardenne

Creek bordered the land owned by claimant. Under such finding claimant is a riparian owner. *Bratschi* v. *Loesch*, 330 Mo. 697, 51 S. W. 2d 69.

The contention that surface water is a common enemy under Missouri law and an owner can throw it off or turn it on to his neighbor's land is not well taken under the facts in this case. The rule stated does not apply where one collects the surface water in a body and causes it to be dumped on his neighbor's land, it does not apply where the water thrown back is flowing in a stream with well defined channels as was Dardenne Creek, and it does not apply where the obstacle placed to impede the water is not intended merely to protect against surface water. *Keener* v. *Sharp*, 341 Mo. 1192, 111 S. W. 2d 118.

ARGUMENT

I DOMINANCE OF GOVERNMENT AS TO SUBMERGED LAND ON A NAVIGABLE RIVER DOES NOT EXTEND TO LAND ON A SMALL NONNAVIGABLE STREAM

A. Compensation by Government for Land Taken Does Not Destroy Government's Paramount Power

In the first place this case does not involve the power of the Government to place a dam in the Mississippi River. The dam was completed and put in operation in 1938 without any hindrance and has since been in constant use. The requirement that compensation be made is not a destruction of the Government's power. It is doubtful if in modern times the fact that compensation must be paid for land taken has ever prevented a government from carrying on a needed project. That is illustrated by what was done in this case. Congress had before it a complete picture of the costs of taking the lands involved and ordered the project to proceed. The engineers also knew what was faced and recommended going ahead. That the cost of taking as compared to total cost of the project is not so

high as to be an obstacle is also shown in this case. The engineers themselves recognized this.* All of the other six properties found by the engineers to be low-lying lands for which they recommended that the Government make compensation (R. pp. 24, 25, Fdg. 8) have been paid for.

If payment of compensation is the extraction of all substance to the Government's paramount power, allowing compensation for flooding of fast land should be denied also. There is as much reason for denying liability for taking fast land as there is for denying it on land on a small nonnavigable stream a considerable distance from the river. River traffic cannot move on either. The whole idea of the Government's paramount power over submerged land located on a navigable stream is the qualified title of the owner of the submerged land. This, of course, is based on the fact that this submerged land is part of the navigable stream over which river traffic eventually moves, a fact a purchaser could see and know.

B. Taking Land on a Nonnavigable Stream Without Compensation Is Neither Legal nor Fair

One buying land a mile and a half from the river and on a little creek certainly would not be put on notice that there was a public interest there or that his title might be affected by the claims of navigation. Congress in its legislation and this Court in its decisions have always made a distinction. *United States* v. *Willow River Power Co.*, 324 U. S. 499, pp. 505, 506. Therefore it would not be either legal or fair to take such land without compensation.

---

*River and Harbor Committee Document No. 34 (House of Representatives) 73rd Congress, 2nd Session, p. 3.

C. Changing the Grade of a Public Highway Is Not Analogous to Changing the Water Level of a Small Nonnavigable Stream

Counsel for Government also spends some time discussing the right of a city to change the grade of a street without liability. All of the cases cited involve cities. In Missouri, a city is liable for the change of grade of a street within its borders. This is based on statutes making such cities liable. The principle asserted however, that a public highway may be changed in grade by the state without liability to the owner of the adjoining property is correct.

We do not think this is authority for the proposition that a private stream may be altered by the Government of the United States without compensation for the damage done thereby. The public highway corresponds to the navigable stream. Anyone buying property on a public highway knows the public right is superior to his own. But this is not the same as a man owning a private road away from the highway or a private road in common with his neighbor. The private road he can if he desires obstruct with his plow or his tractor without in any way obstructing the movements of the public and if the road is owned jointly and his neighbor consents he can obstruct it in any way he pleases. But certainly the state cannot come in and proceed to grade this private road or put a concrete embankment around it without paying him compensation.

Perhaps a short discussion of grading cases in Missouri might clarify the issue. When a state raises the grade of a public highway in front of property so that it is considerably higher than the adjoining land, it has inconvenienced the owner, it may have damaged him but it has not taken his land. He can always get to town, he can always get to the road, his land is intact. Consequently, the courts have said there is merely damage. But another question arises if the action of the state is such that it

destroys the land. Missouri cases have established this in the circumstances where the landowner is a block away from the street which is graded. Counsel for the Government has referred to these cases. Here, the courts say the owner is merely inconvenienced, perhaps damaged. He can always reach his destination by other streets. But if the street which is graded is his only outlet, as for instance where his only exit is a private way blocked by the graded street then he can recover. In a very recent case in Missouri, the court held:

> It could not be said that a property owner would have reasonable access to his property, although it does not abut upon the obstructed part of the street, if the street were fully obstructed on either side of his property so that the lines of his lot could be reached (Lewis Eminent Domain, p. 191, 3d Ed.) or, if the property is connected with the obstructed street by a private way and the obstruction rendered the private way of no use. . . .
>
> *Christy* v. *Chicago, B. & Q. R. Co.*, 212 S. W. 2d 476, p. 479.

In the instant case the effect of shutting off the drainage is to destroy the land.

This Court has expressed the same view in *United States* v. *Welch*, 217 U. S. 333. There, a dam placed in a river raised the water of a creek flowing into the river and this water permanently prevented the owner from reaching a private road which was the only way in and out of his farm. The Court held this a taking.

The argument that the Government's right in the submerged land on a navigable stream is not an easement but a predominant right is merely arguing about terms. What we have said is that it has the same legal effect as if there were an easement on the land when the buyer purchased it. The Government's right certainly amounts to an ease-

ment. It may amount to more but in the last analysis it is simply a limitation upon the title to the property. This Court has called it a "qualified title." *Scranton* v. *Wheeler*, 179 U. S. 141, p. 163.

II A LANDOWNER HAS TITLE TO THE MIDDLE OF A NON-NAVIGABLE STREAM BORDERING HIS LAND WITH DRAINAGE RIGHTS THEREIN

A. Under Missouri Law If Land Is Bordered by Non-navigable Stream, As the Court Below Found This Land to Be, the Owner's Title Extends to the Middle of the Stream

In its supplemental brief the Government states that the court below did not find that claimant had a property right in Dardenne Creek which would give it the right to drainage therein. The Court's findings as to this land were: "On May 12th, 1933, plaintiff acquired title to the land described in the petition as Tract No. 1 and on June 10th, 1938, plaintiff acquired title to Tract No. 2" (R. p. 22, Fdg. 3). "The District contains more than 2,500 acres of land and is located on Dardenne Creek, about one and one-half miles from its confluence with the Mississippi River" (R. p. 21, Fdg. 2). "It is practically enclosed by a levee and the railroad embankment, except where it borders Dardenne Creek on the east. Drainage is removed from the district by gravity through 10 outlets" (R. p. 23, Fdg. 6). "The farm is bounded on the south for about one-quarter of a mile and on the east for about one-half of a mile, by Dardenne Creek, which runs along the south border of the farm in a northeasterly direction" (R. p. 27, Fdg. 11). "The natural drainage of plaintiff's farm, for both surface and subsurface water, is southward into Dardenne Creek" (R. p. 28, Fdg. 14). That before the dam was erected "Although vertical drainage from the surface through the profile of the soil on plaintiff's land is slow, it is effective" (R. p. 28, Fdg. 14). It is thus plain from the finding of the court below that drainage of this

entire farm has always been into Dardenne Creek and that Dardenne Creek runs along the border of the land both on the south and east.

It is established law in Missouri that where a non-navigable stream borders land the owner owns to the middle of the stream. In *Bratschi* v. *Loesch,* 330 Mo. 697, p. 704, 51 S. W. 2d 69, p. 72, the court expressed the law of Missouri in the language of Corpus Juris:

> In 9 C. J., page 187, Section 65, it is said: "A grant or conveyance of land bounded by a non-navigable stream carries with it the bed of the stream to its center unless a contrary intent is manifest from the grant of conveyance itself. In such case the stream is regarded as the boundary or monument and the purchaser takes to the middle of the monument as a part and parcel of the grant. The reason for this is obvious. Ordinarily in a conveyance of this nature there is no purpose to be served, in the retention by the grantor of a narrow strip of land in the bed of the stream, and the intent to grant it will be presumed by a conveyance of the adjacent lands bounded 'by' 'upon' or 'along' the stream or other equivalent phrase."
>
> It is well settled that where a non-navigable stream of water constitutes the dividing line between two tracts of land, absent reservations or restrictions in the deeds showing a contrary intent, as we hold was the case here, the possessor on each side owns to the center or thread of the stream. Benson v. Morrow et al., 61 Mo. 345, 350; Whiteside v. Oasis Club, (Mo. Sup.) 187 S. W. 27, 30; Spurrier v. Hodges, supra; Gould on Waters, (3d Ed.) §§194-197, p. 372, et seq.

The deeds show no contrary intent. Neither do the findings of the court below.

B. Rule That Surface Water Is a Common Enemy Does Not Apply Here

Under farming conditions in Missouri the doctrine arose that one owning land had a right to protect himself by all reasonable means from surface water. He could ditch his farm, put up small embankments and that was not making an artificial water course of it, and so long as he did not collect the surface water and throw it in a body on his neighbors' land he was not liable. *Dardenne Realty Company* v. *Abeken,* 232 Mo. App. 945, p. 951, 106 S. W. 2d 966, p. 969.

But there are several reasons why that rule does not protect the Government here. (1) Under Missouri decisions even as to surface water one cannot collect it on his property and discharge it in a body on adjoining property as a dam of the sort involved here would do. (2) It is established in Missouri that where water flows in a regular channel as it did in Dardenne Creek one cannot obstruct its flow and cause it to flow back on another. (3) The obstruction in order to be justified must be directed to protection from surface water as would certainly not be the case of a dam as large and extensive as Lock and Dam No. 26 involved here. We have in our original brief (p. 19) cited the leading case in Missouri establishing these principles, *Keener* v. *Sharp,* 341 Mo. 1192, p. 1195.

C. Government's Paramount Power Could Not Be Defeated by Selling Two Feet Bordering a Navigable Stream

The argument that one whose land was on a navigable stream could sell a strip of the land along the river one or two feet in width and thus defeat the paramount right in it of the United States seems to us a *reductio ad absurdum.* Selling two feet of land and placing of a power plant or a dam within two feet of the navigable river would

be so palpably a use of the river itself that the question would not be arguable.

D. Size of Land Immaterial Insofar As Its Character As Riparian Land Is Concerned

The argument is made that one can recover only for destruction of riparian rights where the injury is to that portion of the land near the river. This argument is based on one decision of the courts of California, and two of the courts of Nebraska. Not one of these cases decide this question specifically. One definitely did not decide the question at all, merely presenting it as a *quaere*, the second after about two hundred pages of discussion including statutes of the state really holds that the question must be determined by the facts in each particular case. These were cases involving irrigation where other owners were injured. A third case involved remote injuries, such as cattle being deprived of water, with little direct relation to riparian rights. These cases certainly would not apply to a case where drainage of a whole farm was through one stream and into that stream water was backed up and pushed against the land forcing water into it blocking all drainage outlets destroying the land for agriculture.

Jones v. *Conn*, 39 Ore. 30, 64 Pac. 855, decides unequivocally that the size of the tract has absolutely no bearing on its character as riparian land.

The proper and modern rule on this question is set forth in Restatement of the Law of Torts, Chapter 41, §44, 3 (c), p. 327.

> c. *Parcel of land.* The phrase "parcel of land" as used in this Section means a continuous tract or plot of land in one possession, no part of which is separated from the rest by intervening land in another possession. The area or size of the parcel is immaterial insofar as its character as riparian land is concerned.

CONCLUSION

We believe a careful perusal of the cases cited in the Government's supplemental brief will convince the Court that they are not applicable to this case.

We respectfully submit that the judgment of the lower court should be sustained.

RAY B. LUCAS,
STANLEY BASSETT,
3520 Broadway,
Kansas City 2, Missouri,
Attorneys for Respondent, Kansas City Life Insurance Company.